Cornerstones of Enhanced Cooperation

The Principles of Openness and Last Resort in Light of Past Experiences and Future Challenges

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Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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Researcher declaration to accompany the submission of written work
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I Johannes Graf von Luckner certify that I am the author of the work Cornerstones of Enhanced Cooperation I have presented for examination for the LL.M. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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To Elke and Andreas

Thank you for all of your support.

Abstract

Enhanced cooperation is the EU's most general, multi-purpose, and thus differentiation-friendly possibility to legislate without binding all Member States. After years of initial reluctance, it has been put into practice in a number of cases in the last years. In light of these developments, many perspectives on enhanced cooperation are worth revisiting. At the same time, the EU has recently been facing numerous fundamental challenges, and enhanced cooperation could be one of the tools for policy makers to consider when searching for solutions.

Therefore, the overall aim of this thesis is to revisit the enhanced cooperation mechanism and produce novel insights thereon in the light of past experiences and future challenges.

It does so by analysing two crucial legal aspects of the enhanced cooperation mechanism in depth: the last resort principle and the principle of openness. Both principles stand out among the law governing enhanced cooperation as particularly important, defining notions – indeed, cornerstones of enhanced cooperation.

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1 INTRODUCTION

1.1 Enhanced Cooperation

Differentiation is *en vogue* in the European Union. Recently, the two-decade old idea of using integration mechanisms which allow for groups of member states to create EU law which does not bind all member states, i.e. *differentiating* EU law, has been revitalized with an unexpected intensity. This can be seen in EU strategic documents,[1] political statements from various stakeholders,[2] a renewed attention to the topic in the academic community,[3] and new projects implemented in a differentiated manner.[4]

There are various possibilities to introduce differentiating legal acts into the EU legal order. Some are specific to subject areas (for example, Common Security and Defence Policy; European Public Prosecutor's Office). Others differentiate by definition, like those concerning the Eurozone or Schengen Area and their related legal acts. The most general, multi-purpose, and thus differentiation-friendly possibility, though, is the enhanced cooperation mechanism (Art. 20 TEU, Art. 326-334 TFEU). Enhanced cooperation, introduced into the European Treaties with the Treaty of Amsterdam 1999, is a mechanism that allows Member States to adopt secondary EU legislation which only binds the states willing to join. It is applicable to a wide range of legal fields and not restricted to specific subjects (see Art. 20 (1) TEU).

Unsurprisingly, this general differentiation tool has raised significant scholarly interest after its introduction to the treaties. This resulted in a broad knowledge base in the field, which

[1] European Commission, *White Paper on the Future of Europe*, Scenario 3, p. 20 ff.

[2] *Emmanuel Macron*, Initiative for Europe, http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html (accessed 01.12.2017); *Angela Merkel*, https://www.bundeskanzlerin.de/Content/DE/Mitschrift/Pressekonferenzen/2017/03/2017-03-25-statement-merkel-rom.html (accessed 01.12.2017).

[3] See i.a. conferences like College of Europe – European University Institute, Joint conference on Differentiation: A new pragmatism or the end of ever closer union? https://apps.eui.eu/Events/download.jsp?FILE_ID=11043 (accessed 28.11.17); University of Copenhagen, Legal Disintegration in the European Union, http://jura.ku.dk/cecs/calendar/legal-disintegration-conference/ (accessed 28.11.17); or publications like Bruno de Witte, Andrea Ott and Ellen Vos, *Between Flexibility and Disintegration*; Thomas Giegerich, Desirée C. Schmitt and Sebastian Zeitzmann, *Flexibility in the EU and beyond*.

[4] E.g. European Public Prosecutor's Office which is being introduced by a group of 22 Member States and the Permanent Structured Cooperation in the field of common security and defence policy (PESCO), implemented by 23.

dates back mostly to the late 1990s and early 2000s.[5] In the meantime, however, numerous developments have taken place and changed the EU legal communities' perspective on enhanced cooperation.

The norms concerning enhanced cooperation have been restructured, and the hurdles for legislative projects through it have been lowered. Most importantly though, after years of initial reluctance, the enhanced cooperation procedure has been put into practise. In 2010, an enhanced cooperation between 14 Member States was launched in the field of divorce and legal separation.[6] One year later, 25 Member States agreed on an enhanced cooperation to create a European patent system with unitary effect.[7] In 2013, an enhanced cooperation about a Financial Transaction Tax was added to the growing number of projects (11 participants),[8] and in 2016, another enhanced cooperation was concluded between 18 states in the field of international couples' property regimes.[9] Finally, in 2017, the European Public Prosecutor's Office (22 Member States) was launched as an enhanced cooperation, although on a slightly different legal basis.[10] In addition, a total of four cases were brought to the ECJ regarding enhanced cooperations.[11] Another example that comes to mind is the 'Permanent Structured Cooperation' in the field of defence policy (PESCO) (23 participants). While resembling an enhanced cooperation, this mechanism follows different rules.[12] It does, however, serve as an important point of reference and comparison for the enhanced cooperation mechanism.

This extensive activity in the field led to new perspectives on the enhanced cooperation mechanism, which I would like to follow up in my thesis:

Where in previous research various questions had to be left open, the practical application of the enhanced cooperation mechanism has produced answers. Expectations can be updated

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[5] Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*; Andrea Cannone, *Le cooperazioni rafforzate*; Mariola Urrea Corres, *La cooperación reforzada en la Unión Europea*; Gerrit Linke, *Das Instrument der verstärkten Zusammenarbeit im Vertrag von Nizza*; Kerstin Junge, *Flexibility, enhanced co-operation and the Treaty of Amsterdam*.

[6] Council Decision 2010/405/EU; see Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*.

[7] Council Decision 2011/167/EU.

[8] Council Decision 2013/52/EU.

[9] Council Decision 2016/954/EU.

[10] Art. 86 TFEU.

[11] ECJ C-274/11, 295/11 (*Italy/Spain v Council)*, ECLI:EU:C:2013:240; C-146/13 (*Spain v Parliament and Council*), ECLI:EU:C:2015:298; C-147/13 (*Spain v Council*), ECLI:EU:C:2015:299; C-209/13 (*UK v Council*), ECLI:EU:C:2014:283.

[12] Art. 42, 46 TEU and Protocol No. 10 (PESCO).

after having been proven right or wrong. Moreover, the assumptions made in the early enhanced cooperation research can today be reviewed, which allows for a renewed and updated overall knowledge on this specific integration and differentiation mechanism. Moreover, and maybe most importantly, the EU has been facing numerous fundamental challenges in recent times. Therefore, in this thesis, I also want to explore to what extent the enhanced cooperation mechanism could be used to address such challenges. Hence, in a nutshell, I want to revisit the enhanced cooperation mechanism and produce novel insights thereon in the light of past experiences and future challenges.

Since a thorough, detailed analysis of every legal aspect of the enhanced cooperation mechanism would exceed the boundaries of an LL.M. thesis, I will focus on two aspects of enhanced cooperation: the last resort principle and the principle of openness. Both principles stand out among the law governing enhanced cooperation as particularly important, defining notions – they are indeed the cornerstones of enhanced cooperation. Therefore, a renewed in-depth analysis of both can help to understand the mechanism in new ways.

1.2 Method

As mentioned above, numerous questions in the field of enhanced cooperation research have been left unanswered in the past or were subject to diverging interpretations. Many of these questions concern the rules that apply to the mechanism: Enhanced cooperation may only be used as a last resort (Art. 20 (2) TEU) - what does this term mean and what must be done prior to resorting to differentiation? Any enhanced cooperation must be open at any time to all Member States (Art. 20 (1) TEU) – is this an unlimited right for non-participants? As stated before, these rules were previously interpreted somewhat autonomously. Nowadays, on the other hand, any attempt to interpret them can resort to the experiences of practical application of enhanced cooperation. In this context, one source of insights could be the interpretations of the ECJ in the abovementioned cases and the materials they are based on themselves, which may provide a broad source of interpretative aids (such as the AGs' opinion and the

submissions of parties and interveners). Although these certainly do not answer all open questions, they can provide new guidelines as to how future application should approach the various conditions.

Moreover, when preparing this thesis, I obtained different procedural documents (like the before-mentioned submissions) from different EU institutions through access to documents requests.[13] In the light of such new documents, arguments, and interpretations, in this thesis, I will try to newly and further develop the former doctrinal analyses and assumptions, creating an updated and thorough itinerary for future enhanced cooperation projects as well as help to understand when enhanced cooperation cannot be resorted to according to the two discussed principles. Moreover, it is this kind of insight that can be used to think about answers to current challenges the EU is facing.

As explained in the beginning, there are currently four 'regular' enhanced cooperation projects based on Art. 20 TEU. Moreover, there is one enhanced cooperation, the European Public Prosecutor's Office based on Art. 86 TEU, which has less strict rules when it comes to the activation of the procedure – I call this a "facilitated enhanced cooperation". Hence, where I write of four existing enhanced cooperation projects, only the ones based on Art. 20 TEU are referred to. This is especially relevant for the chapter on the last resort criterion, which does not exist for the facilitated enhanced cooperation.

[13] Applications under the EU Access to Documents-Regulation (Regulation (EC) No 1049/2001).

2 The Principle of Last Resort

2.1 Introduction

When the enhanced cooperation procedure is applied, the interested Member States first need an authorisation decision from the Council (on a proposal from the Commission and after obtaining the consent of the Parliament). Once the cooperation has been authorised, the Council, acting in a setup of only participating Member States having the right to vote, can adopt regulations and directives in the usual procedure. One of the most central requirements that need to be fulfilled in order to activate enhanced cooperation, i.e. to issue the authorisation decision, is the 'last resort' criterion (Art. 20 (2) TEU). Differentiated legislation can only be used as a last resort when it has been established that a legislative project does not find the necessary majority among the Council members within a reasonable period of time. This ensures that seeking a compromise among all Member States remains the default option, and enhanced cooperation is not used on an everyday basis. Preventing arbitrary exclusion of Member States from certain projects, the last resort criterion is a defining feature and a crucial cornerstone of the enhanced cooperation mechanism. The inability to come to a solution with the Union as a whole must be stated explicitly by the Council.[14]

The legal content of the last resort criterion is subject to a considerable range of different interpretations. Whereas the basic idea of the criterion is fairly clear,[15] the Treaties do not foresee any provisions on its practical application. Some particularly relevant questions when applying the enhanced cooperation procedure are:

- What does the term "last resort" mean, and what is a "reasonable period"? Which Council actions can be taken into account when assessing it, and what is the minimum activity necessary in the Council prior to resorting to enhanced cooperation, if any?
- Closely connected to the first set of questions: Is there a way to "fast track" an enhanced cooperation if all Member States agree that they do not want to legislate jointly? Could such a "fast track" be helpful in times of crisis?

[14] It can, but does not have to be stated in a separate Council decision (although some Treaty versions, like the German language version, might suggest otherwise), see: Ulrich Becker, *Art. 20 EUV, Art. 326-334 AEUV*, Art. 20 EUV, 50; Gerrit Linke, *Das Instrument der verstärkten Zusammenarbeit im Vertrag von Nizza*, p. 113; Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 53. The inability to come to a solution with the Union as a whole must eventually be stated explicitly by the Council.

[15] Hermann-Josef Blanke, *Art. 20 EUV* Art. 20 EUV para 43.

- To what extent does the Court of Justice scrutinize the last resort criterion, potentially limiting its application?

In the following, I will aim to find answers to these questions by combining findings from the literature and well-explored sources with previously unexplored materials.

As a first step, I will trace back the last resort criterion in the previous Treaty versions to gain insights into the aims of the Treaty legislator. Secondly, I will analyse the second main source of information when interpreting the Treaties, namely judgements, especially by the Court of Justice (ECJ). Only one of the four judgments on enhanced cooperation explicitly scrutinized the last resort criterion and will therefore be analysed. However, the final judgements are not the only revealing document type produced during Court proceedings. When writing this thesis, I applied for and gained access to the pleadings of all Parties intervening in the proceedings under the EU Access to Documents-Regulation.[16] These pleadings from EU Institutions and several Member States, acting as defendant, applicants, and interveners contain a vast set of different arguments on and interpretations of the subject. The ECJ regularly reiterates the main arguments of the involved parties but does so only briefly and only in terms of arguments which it takes a stance on itself within the judgement. Therefore, analysing the pleadings provides new insights on known arguments and unveils points which have been raised but not addressed by the Court. In doing so, the research can also show which arguments were neglected without even mentioning them (which can be a stronger reaction than explicitly disregarding) and invalidate accusations of the Court having overlooked aspects of a case.

2.2 Last Resort

2.2.1 The Role of the Last Resort Criterion

The 'last resort' criterion is one of the most central requirements that need to be fulfilled in order to activate enhanced cooperation. It is introduced to the Treaties in Art. 20 (2) TEU:

> *The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such*

[16] Regulation (EC) No 1049/2001.

cooperation cannot be attained within a reasonable period by the Union as a whole […]

Beyond being a legal condition, the last resort criterion (also referred to as *ultima ratio* principle[17]*)* is considered to reveal the *ratio essendi*, the reason for the existence of enhanced cooperation. Since it can only be used as last resort, enhanced cooperation is necessarily a secondary option to which a solution including all Member States is to be preferred, making enhanced cooperation subsidiary to uniform legislation.[18]

However, the term "last resort" is ambiguous,[19] with interpretations varying considerably. Art. 20 TEU is the only occasion in which the term last resort is used in the Treaties; the lack of points of reference adds to its ambiguity.

In the following, and as a preparation for my own interpretation, I will trace back the history of the last resort criterion in the different Treaty versions. Afterwards, I will reiterate the ECJ's findings on the criterion.

2.2.2 Treaty History

Treaty of Maastricht

The Treaty of Maastricht (1993) foresaw the possibility of legal differentiation by means of "closer cooperation" in the fields of common foreign and security policy (Art. J.4 (5) TEU (Maastricht)) and justice and home affairs (Art. K.7 TEU (Maastricht)). However, this was meant as a cooperation *outside* of the Treaties. Thus, the conditions for such cooperation are limited to not conflicting with or impeding the provisions of the TEU. For this reason, a last resort criterion is not foreseen.

Treaty of Amsterdam

[17] Matthias Ruffert, *Art. 20 EUV*, Art. 20 EUV para 19.
[18] Hermann-Josef Blanke, *Art. 20 EUV*, Art. 20 EUV para 43; Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 247; Andrea Cannone, *Le cooperazioni rafforzate*, p. 73.
[19] Eric Philippart, *A new mechanism of enhanced co-operation for the enlarged European Union*, p. 12.

The Treaty of Amsterdam, which entered into force in 1999, picked up the term "closer cooperation"[20], although changing its meaning and introducing for the first time the concept nowadays referred to as enhanced cooperation, i.e. an integration procedure *within* the EU framework without all Member States participating.

In doing so, it also introduced for the first time the notion of last resort, Art. 43 (1)(c) TEU (Amsterdam):

> *[T]he cooperation […] is only used as a last resort, where the objectives of the […] Treaties could not be attained by applying the relevant procedures laid down therein*

By referring to the objectives of the Treaties, rather than the objectives of a single legislative project, the Treaty set a high bar for the application of the procedure: If a single legislative project fails to attain a majority, it does not necessarily mean that the Treaty objective lying *behind* it cannot be reached.[21] This may have been one of the reasons why the closer cooperation under the Treaty of Amsterdam was never put into action. Another reason for this may have been the referral to the "relevant procedures": This expression shows that a legislative procedure must have necessarily been brought to an unsuccessful conclusion before Member States could resort to closer cooperation. This, on the other hand, could be delayed willingly by uncooperative Member States in order to prevent a differentiated approach altogether or to "put a price on their vote in the authorisation procedure", even on a negative vote.[22] Furthermore, in the Amsterdam version of the TEU, it is not explicitly clear who is responsible for assessing whether the last resort criterion is fulfilled.[23]

These difficulties made the procedure practically impossible to use and led to reform debates during the negotiations for the Treaty of Nice.[24] When it came to the last resort criterion, Member States realized the difficulties it caused, and Italy and Germany, in a joint position

[20] This applies for the English language version. Interestingly, other versions such as Italian and German already changed the name of the mechanism to what in English later became "enhanced cooperation" ("verstärkte Zusammenarbeit" and "cooperazione rafforzata" as opposed to "engere Zusammenarbeit" and "cooperazione più stretta").
[21] Eric Philippart, *A new mechanism of enhanced co-operation for the enlarged European Union*, p. 18.
[22] Ibid.
[23] Ibid.
[24] For a thorough summary of the process and the different positions, see Gerrit Linke, *Das Instrument der verstärkten Zusammenarbeit im Vertrag von Nizza*, p. 67 ff.

paper on enhanced cooperation, even proposed its deletion due to its ambiguities and the risk of juridical disputes to clarify the criterion.[25]

Treaty of Nice

In the Treaty of Nice, the term "enhanced cooperation" was introduced to replace "closer cooperation". In this process, the last resort criterion was given an exposed position in a whole article on the matter:

Article 43a TEU (Nice)

Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.

The new wording meant a significant lowering of the last resort-threshold: Instead of demanding that an objective of the Treaties cannot be attained otherwise, the Nice-version focuses on the specific legislative project that Member States want to conclude. Moreover, instead of explicitly calling for a concluded legislative process, Art. 43a TEU (Nice) stresses that it is sufficient if the objectives of the project cannot be attained "within a reasonable period by applying the relevant provisions of the Treaties", disempowering states wanting to prevent differentiated integration through delaying tactics.[26] However, the referral to the application of the relevant Treaty provisions still points towards an ordinary legislative procedure.

Finally, the Council was exclusively entrusted with establishing whether the criterion was fulfilled.

Despite some remaining ambiguities, the negotiations for the Treaty of Nice resulted in a last resort-formula that was considered to be lighter, less fragmenting and to leave more liberty to the willing.[27]

[25] CONFER 4783/00, p. 5.
[26] Ibid, p. 18 f.
[27] Eric Philippart, *A new mechanism of enhanced co-operation for the enlarged European Union*, p. 18; see also Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 52.

Constitutional Treaty and Treaty of Lisbon

As far as the last resort criterion is concerned, the Constitutional Treaty, rejected in 2005, and the Lisbon Treaty which has been in force since 2009, are identical. Art. I-44 Constitutional Treaty and Art. 20 TEU read:

> *The […] decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole*

The main change of the formula is the deletion of the phrase "by applying the relevant provisions of the Treaties", which as described above, lead to uncertainties as to which procedural steps are necessary in the Council concerning a uniform approach. The rationale for this change, according to the presidium of the European Convention drafting the Constitutional Treaty, was to "make[…] it clearer that the last resort condition does not necessarily mean the failure of a previous procedure, or even that any such decision-making procedure has been initiated".[28]

2.2.3 Court of Justice Interpretation

Of the four cases brought to the ECJ concerning enhanced cooperation,[29] only one dealt with the last resort criterion, namely *Spain/Italy v. Council* on the EU unitary patent.[30]

2.2.3.1 The Case

In *Spain/Italy v. Council*, Spain and Italy sought annulment of the Council decision authorising enhanced cooperation in the field of a unitary patent. The dispute arose after the patent system, which all Member States agreed on in principle, was passed as an enhanced cooperation

[28] CONV 723/03, p. 18; c.f. Bernd Martenczuk, *Enhanced Cooperation*, p. 88.
[29] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240; C-146/13 (*Spain v Parliament and Council*), ECLI:EU:C:2015:298, C147/13 (*Spain v Council*), ECLI:EU:C:2015:299; C-209/13 (*UK v Council*), ECLI:EU:C:2014:283.
[30] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240.

due to the Council's inability to find a language regime that contented all Member States. Italy and Spain wanted their respective languages to be official languages of the patent, or to only resort to English as an official language. When the final solution foresaw English, French, and German, they refused to become part of the system and eventually brought the case to the Court. In the ECJ case, in addition to Spain and Italy as applicants and the Council as defendant, 13 Member States and institutions[31] acted as interveners, all of them in favour of the decision.

2.2.3.2 Judgement of the Court of Justice

The Court of Justice (Grand Chamber), in its judgement, pointed out that the last resort criterion is a "particularly important" condition and must be read in the light of Art. 20 (1) TEU insofar as it provides that enhanced cooperation aims to further the objectives of the union, protect its interests, and reinforce the integration process. In this context, the Court stressed that it would not be in the Union's interests if all fruitless negotiations could lead to an (or several) enhanced cooperation(s).

In terms of its own role, the Court stated that it is its task to "ascertain whether the Council has carefully and impartially examined those aspects that are relevant […] and whether adequate reasons have been given" and confirmed that the Council is best placed to determine whether an agreement among all Member States can be reached in a reasonable period.[32]

In terms of the unitary patent case, it held that several attempts were conducted to find a compromise in terms of the patent's language regime. Given this, and the appropriate reasoning on this by the Council, the Court stated that it could not find any evidence that could disprove the Council's evaluation of the enhanced cooperation being a last resort.[33] Moreover, it pointed out that last resort is not limited to cases in which the Members States declare that they are not willing or ready to take an integration step, but it can also be caused by the inability to agree on the implementation of a measure.[34]

[31] Namely Belgium, the Czech Republic, Germany, Ireland, France, Latvia, Hungary, the Netherlands, Poland, Sweden, the United Kingdom, the European Parliament, and the Commission.
[32] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 54.
[33] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 55.
[34] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 36.

2.3 Interpretation

As stated in the introduction, the last resort criterion is still subject to debates and unclarity. This has a potential to keep Member States from applying enhanced cooperation when needed. Moreover, so far, the insecurity about its precise content led to lengthy processes prior to resorting to enhanced cooperation, which made the mechanism less suitable as a measure to react to imminent problems.

In the following, I will bring together findings from the literature, the material above, and the before-mentioned pleadings from *Spain/Italy v. Council* to produce new insights on the two most contested areas of questions: the level scrutiny of the ECJ and the substantial content of the criterion, as described in the questions above. In doing so, I aim to clarify some of the open questions which could help make the procedure easier to use in the future.

2.3.1 Level of scrutiny

After the ECJ judgement in *Spain/Italy v. Council*, many were unpleased with how the Court had scrutinized the last resort criterion.

Jäger and *Lamping* both regard the ECJ judgement on the unitary patent as a significant weakening of the last resort criterion. The last resort criterion, they say, is "reduced to a mere requirement to state reasons",[35] while the Court is "hiding behind the separation of powers".[36] This was drawn from the Court's statements that the Council is "best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future"[37] and "[t]he Court […] should therefore ascertain whether the Council has carefully and impartially examined those aspects that are relevant to this point and whether adequate reasons have been given for the conclusion reached by the Council." In doing so, both clearly interpret the Court's statements as excluding any further

[35] Thomas Jaeger, *The End to a Never-Ending Story? The Unitary Patent Regime*, p. 278.
[36] Matthias Lamping, *Enhanced Cooperation in the Area of Unitary Patent Protection*, p. 10.
[37] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 53.

scrutiny. Especially *Lamping* does not seem to see this approach as a legal obligation but as a way of avoiding a (hence theoretically possible) scrutiny of political assessments.[38]

Pistoia, in this context, points out that in her opinion "such control totally left aside a review of the merits of last resort as such",[39] and that the Court does not only put a focus on, but limits itself to only reviewing carefulness and impartiality together with the adequacy of the given reason.[40] However, in contrast to *Jäger* and *Lamping,* she agrees with the legal necessity of such limited scrutiny of political assessments.

These interpretations, although founded in the *Spain/Italy v. Council* case and previous case law, may not be having regard to the whole picture as presented above.

In fact, taking into account the materials that the Court had at its disposal, it seems that interpreting the judgement as a Court's withdrawal from substantial scrutiny of the last resort criterion is premature. Firstly, it may be true that the Court assessed the criterion in a limited way. However, its language when doing so is remarkably open: "[The Court] should therefore ascertain whether the Council has carefully and impartially examined those aspects […] and whether adequate reasons have been given […]" – Nowhere does it state that it actually *must limit* itself to that. Isolated, this may not seem like a major finding. However, considering the arguments that the different parties equipped the Court with, allows for this phrasing to be seen in a new light:

Several interveners, including even the applicant Italy,[41] but also the AG,[42] the Council,[43] the European Parliament[44], and Ireland,[45] proposed a set programme for the scrutiny of the last resort criterion indicating plenty of relevant case law which points in this direction.[46] This

[38] Matthias Lamping, *Enhanced Cooperation - A Proper Approach to Market Integration in the Field of Unitary Patent Protection?*; Matthias Lamping, *Enhanced Cooperation in the Area of Unitary Patent Protection - Testing the Boundaries of the Rule of Law*.
[39] Emanuela Pistoia, *Enhanced Cooperation as a tool to…enhance integration?*, p. 254.
[40] Ibid., p. 259.
[41] Complaint of the Italian Republic in C-295/11, Court register no. 876261, para 100.
[42] Opinion of AG Bot in C-274/11, C-295/22 (*Spain/Italy v. Council*), ECLI:EU:C:2012:782, para 115 f.
[43] Council of the European Union, Escrito de Contestacíon in C-274/11, para 52; Council of the European Union, Controricorso in C-295/11, para 47.
[44] Statement in intervention of the European Parliament in C-295/11, Court Register no. 893668, para 20; Statement in intervention of the European Parliament in C-274/11, Court Register no. 893544, para 29.
[45] Statement in intervention of Ireland in C-274/11, Court Register no. 894401, para 14; Statement in intervention of Ireland in C-295/11, Court Register no. 894479, para 10.
[46] See ECJ C- 435/08, (*Enviro Tech (Europe)*) ECLI:EU:C:2009:635, para 47; C-326/05 P (*Industrias Químicas del Vallés v Commission*) ECLI:EU:C:2007:443, para 75-77.

would have meant that the Court would have, once and for all, limited its scrutiny exclusively to manifest errors of assessment, misuse of powers, and the Council manifestly exceeding the bounds of its discretion. While this would have provided the Court with fixed and easy to handle guiding lines for future cases, it would have largely limited it in its ability to scrutinize future enhanced cooperation attempts: It takes a lot for Council action to qualify as *manifestly* exceeding the bounds of its discretion. For the same reason, had the Court intended to disregard the last resort criterion, as argued by the authors mentioned above, this solution would have provided a convenient strategy to do so.

The Court, however, stayed away from such a set scrutiny programme and did not quote any earlier cases. Rather, it seems to point to a strong focus on, but not necessarily a fixed limitation of, its scrutiny.

Also, some interveners like the European Parliament, implicated that the last resort criterion was so purely political (or the margin of appreciation so wide) that they did not even discuss the merits of the case and just declared it to be met.[47] Had the Court really wanted to point out that the last resort was a purely political criterion, it could have followed suit. However, the Court did explore the situation underlying the Unitary Patent Case,[48] showing that it does not simply disregard the last resort principle.

All of this can be interpreted as the Court staying on alert. It is apparent from *Spain/Italy v. Council* that in fact the Court did not intend to stand in the way of enhanced cooperation as a matter of principle. However, the Court seems to see the risks of this integration mechanism and, therefore, stays vague enough to be able to intervene if necessary – also by means of the last resort criterion. These findings give rise to quite a different interpretation than the one pointed out above: In fact, despite the Court's limited scrutiny in *Spain/Italy v. Council*, it did not establish a set programme for assessing the last resort criterion and did not retreat from scrutinizing the last resort for good. Thus, the Court's strategy should be interpreted as an approach of *abuse control*. It does – at least for the time being - grant the Council a wide margin of appreciation when assessing whether an agreement can still be reached. This also means that the Court sees the possibility that enhanced cooperation may develop further and

[47] Statement in intervention of the European Parliament in C-295/11, Court Register no. 893668, para 20 ff.; Statement in intervention of the European Parliament in C-274/11, Court Register no. 893544, para 29 ff.
[48] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 55-57.

that it is not yet decided how the mechanism will be used in future. However, should a majority of the Member States misuse enhanced cooperation, the Court stays ready to step in.

2.3.2 Content of "last resort" and a "reasonable period"

The term "last resort" is a vague legal concept. After being completely open in the Treaty of Amsterdam, it was made slightly more concrete by the Treaty of Nice, which pointed out that enhanced cooperation was to be used as "last resort, when […] the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties" (Art. 43a TEU (Nice)), emphasising that the criterion is to be understood essentially as a temporal factor. Finally, the wording was changed to "when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" (Art. 20 TEU), deleting the reference to the relevant Treaty provision in order to point out that "the last resort condition does not necessarily mean the failure of a previous [legislative] procedure".[49] However, the content of the criterion was still far from clear, especially before *Spain/Italy v. Council* was decided.

The Court, in its judgement on the matter, pointed out that this means "only those situations in which it is impossible to adopt such legislation in the foreseeable future".[50] Nonetheless, it also stressed that "[t]he Union's interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation",[51] making clear that the temporal unforeseeability of a uniform legislation must be backed by a certain substance of the negotiations. Therefore, it will in any case depend on the details of the specific case whether an enhanced cooperation can be implemented as "last resort":[52] The more states agree to disagree, the less discussion is needed.[53]

However, it does seem possible to give some more substance to the criterion.

[49] CONV 23/03, p. 18.
[50] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 50; Sebastian Zeitzmann, *Patentrecht: Ermächtigung zur Verstärkten Zusammenarbeit*, p. 475, 480.
[51] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 49.
[52] Hermann-Josef Blanke, *Art. 20 EUV*, para 44.
[53] Steve Peers, *Enhanced Cooperation: the Cinderella of differentiated integration*, p. 87.

2.3.2.1 Council Activity to consider

The first question to discuss may not be an obvious one and was therefore not discussed in the literature so far. However, in the context of the Unitary Patent proceedings, it became very clear that the question of which Council activity on a given subject even counts as attempts to find a uniform solution is a controversial issue and can have a major impact on the outcome.

The idea of establishing a unitary patent dates back to the 1970s, including discussions in the Council. A first draft regulation was tabled significantly later in 2000.[54] On the other hand, the final act that eventually led to enhanced cooperation was different from this first proposal and had only been discussed for a few months when the Council decided that unanimity could not be reached. This divergence illustrates the impact of the question. Given the absence of literature on the topic, the Court materials in the only case in which the question was addressed have particular importance in answering the question.

The possible approaches to the topic differ mostly in the degree of formality that is required for Council activity to be regarded as part of a decision-making and compromise-finding process. The most informal approach was chosen by the UK[55] and Poland.[56] Both argued that every discussion that has ever taken place on an abstract topic (in the patent case, the talks during the past 40 years) plays a role and must be taken into account when assessing whether a solution cannot be found in a reasonable period.

Other parties, like the Council,[57] Commission,[58] Germany,[59] and AG *Bot*,[60] claimed that only formal discussions on legislative proposals can be regarded, even when they are not identical with the proposal that was debated before resorting to enhanced cooperation. This would, in the unitary patent case, mean that proposals like the one from 2000 are relevant, whereas prior discussions on the broader topic of a European Unitary Patent must not be considered.

[54] Proposal for a Council Regulation on the Community patent, COM(2000) 412 final, 2000/0177(CNS).
[55] Statement in intervention of the United Kingdom in C-274/11, Court Register no. 894567, para 32.
[56] Statement in intervention of Poland in C-295/11, para 30.
[57] Council of the European Union, Escrito de Contestacíon in C-274/11, para 55 f., Council of the European Union, Controricorso in C-295/11, para 49 f.
[58] Statement in intervention of the Commission in C-295/11, Court Register no. 894482, para 64.
[59] Statement in intervention of Germany in C-274/11, p. 7 para 17 f.; Statement in intervention of Germany in C-295/11, para 18 f.
[60] Opinion of AG Bot in C-274/11, C-295/22 (*Spain/Italy v. Council*), ECLI:EU:C:2012:782, para 119 ff.

The defendants Spain[61] and Italy,[62] on the other side of the spectrum, took the most formal stand, only taking into account work on the very proposal that the Council debated before concluding that unanimity could not be reached.

The Court, although not explicitly deciding on the issue, did not take into account the discussions from decades ago. When assessing the Council's attempts to find a solution for the Union as a whole, it refers to the fact that "the legislative process undertaken […] was begun during the year 2000" and marks this as starting point of the proceedings that must be taken into account.[63] Hence, the Court chose a semi-formal approach, still closely related to legislative processes. While refusing to take into account every debate on the broad, abstract topic in question, the court assesses the formal Council activity that has a clear internal connection to the eventual proposal. This approach is very likely to be the guideline for future enhanced cooperation projects. Hence, it is advisable for involved parties to start working on a concrete proposal, not despite, but because of a possible need to resort to enhanced cooperation and even if such a proposal is far away from what Member States eventually want to be passed by the Council. This is also affirmed by all other occasions of enhanced cooperation: In all cases, enhanced cooperation was only started after discussion on the basis of a proposal issued by the Commission had taken place.[64]

However, especially in the light of the drafting history in which the need for a formal legislative procedure was rejected and the Court also taking into account discussions on an outdated draft regulation, a relevant discussion may not always have to be about a Commission legislation draft[65]: In legislative procedures, the Council has what is sometimes referred to as "Indirect Right of Initiative". Under Art. 241 TFEU, the Council can, with simple majority, request the Commission to submit proposals for legislation. If a Council discussion in preparation of such a request is conducted in a sufficiently detailed and substantive manner, it constitutes

[61] Complaint of the Kingdom of Spain in C-274/11, Court Register no. 875676, para 54 ff.
[62] Complaint of the Italian Republic in C-295/11, Court Register no. 876261, para 95 ff.
[63] ECJ C-274/11, 295/11 (*Spain/Italy v Council*), ECLI:EU:C:2013:240, para 55.
[64] Enhanced cooperation on divorce and legal separation: Council Decision 2010/405/EU, para. 3; financial transaction tax: Council Decision 2013/52/EU para. 4; international couples' property regimes: Council Decision (EU) 2016/954, para. 3.
[65] See also Steve Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation*, p. 348.

formal Council activity and has a sufficiently clear internal connection with a legislative procedure. Therefore, under the standards set by the ECJ, this should equally be able to constitute a valid and adequate attempt of finding a compromise among all Member States.

2.3.2.2 Required Intensity of Council Engagement

When it comes to the question of what the Council proceedings must comprise substantially to rule out the option of finding a uniform legislative solution, opinions still vary significantly.

Firstly, the Treaties do not foresee any type of minimum threshold for the last resort criterion to be met. When it comes to the question what the Member States need to try before resorting to enhanced cooperation, there is a broad consensus in the literature and state practise as conducted in the patent case, that there cannot be a set minimum period (like "a minimum of 1 year" or "a minimum of 5 Council sessions") for the Council to have discussed an issue. Beyond this consensus, there is disagreement about the necessary Council activity in both legal literature and practise.

Maybe the most extensive interpretation was offered by *Kuipers*. He, in the context of the first enhanced cooperation on divorce and legal separation, claims that "it cannot be maintained that enhanced cooperation was the instrument of last resort" because the Institutions had not made use of the '*passerelle*-clause' in Art. 81 (3) TFEU.[66] This clause gives the Council the opportunity to change the procedure for legislation regarding "family law with cross-border implications" from unanimous to qualified majority voting (QMV). It can do so with a unanimous vote after consulting the European Parliament and giving all national parliaments the possibility to object within six months. Art. 81 (3) TFEU is, however, not the only *passerelle*-clause in the Treaties. Art. 48 (7) TEU allows the same, applying the same procedural hurdles for all unanimity decisions in the TFEU and in Title V TEU, except for those which concern military or defence matters. Hence, following *Kuiper*'s reasoning, the Council would have to try to use *passerelle*-clauses in virtually *all* legislative projects before resorting to enhanced cooperation. This would, among other things, regularly lead to a six month pause for the various projects, significantly slowing down the processes. Moreover, since the Council is best placed

[66] Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*, p. 216; on this clause: Sebastian Zeitzmann, *Zuviel gewollt, zu wenig geregelt? Das komplizierte Verhältnis der Verstärkten Zusammenarbeit zu aquis communautaire*.

to determine whether an agreement between all Member States can be reached, it seems fair to say the Council can, in this process, also rule out the possibility that Member States could agree to QMV, without putting this to a formal vote. The interpretation that an enhanced cooperation is only a last resort after having resorted to possible *passerelle*-clauses can therefore be disregarded.

Another seemingly very broad interpretation (which, like *Kuiper*'s proposal, dates back to the time before the Unitary Patent judgement) is offered by *Brackhane*, who states that through the last resort criterion, cases in which a Member State is kept from participating in a legislative project for *objective reasons*, not lying within its power, are excluded from enhanced cooperation. Thus, only cases in which a state subjectively does not want to participate fall into the scope of enhanced cooperation. Such an objective obstacle, according to *Brackhane*, could be the economic weakness of a Member State.[67] *Becker* understands this as meaning that the Member States must first try to overcome all disagreements caused by economic doubts by offering financial aid, resulting in "immeasurable duties to provide assistance".[68] Such an interpretation would indeed be problematic. However, first of all, the idea of a duty for the participating Member States to provide assistance to promote the participation in an enhanced cooperation was discussed already in the drafting process of the Treaty of Amsterdam, brought forward by the European Parliament.[69] While this idea seems to have intended assistance to join *after* the start of an enhanced cooperation, the arguments can be transferred also to assistance *before* joining, since one case would necessarily lead to the other. Hence, (financial) assistance to promote participation was considered but actively disregarded and is therefore not part of the duties imposed by the last resort criterion.[70] Beyond that, *Becker* seems to overstate the idea of an "objective" hindrance. In fact, when is a state *objectively* hindered from participating in a measure? When it would cost more money than the state has at its disposal? Or more than a certain percentage of its budget? Whether or not a state can afford something is a political question. Although *Becker*'s criticism seems to miss the core of

[67] Birgit Brackhane, *Differenzierte Integration im Recht der Europäischen Union*, p. 179; on similar proposals of including financial aids in enhanced cooperation: Gerrit Linke, *Das Instrument der verstärkten Zusammenarbeit im Vertrag von Nizza*, p. 166 ff.
[68] Ulrich Becker, *Art. 20 EUV, Art. 326-334 AEUV*, Art. 20 EUV, para 51.
[69] EP, OJ 1997 C 115/167, para 20.
[70] See Claus-Dieter Ehlermann, *Engere Zusammenarbeit nach dem Amsterdamer Vertrag: ein neues Verfassungsprinzip?*, p. 379; , Art. 327 AEUV para 2.

the idea, the disagreement shows that the criterion "objective hindrance" hardly works in a legal sense. Therefore, it is necessary to find landmarks within the political process, rather than seemingly scientific ("objective") criteria.

According to *Becker*, a failed legislative procedure is an "indispensable formal requirement" despite the evolution of the Treaty provisions (see above), since the TEU refers to an agreement of all Member States as a preferential scenario, and this always implies passing legal norms.[71] Although it may be true that uniform legislation attempts generally comprise such a procedure, it is the stated intention of the Treaty legislator,[72] manifested in a clear Treaty evolution, that specific procedural steps should not be formally required to fulfil the last resort criterion. This seems like an indication too strong for Art. 20 TEU to still require a complete legislative procedure.[73]

Moreover, formally requiring a failed legislative proposal would lead to additional confusion: The course of action for legislation through an enhanced cooperation is to first of all issue a Council decision allowing the enhanced cooperation *per se* in a specific field (i.e. creating a unitary patent, a financial transaction tax, etc.). Then, in a second decision, secondary law, which introduces the new substantial rules for that field, is passed. This approach is embedded in the Treaties[74] and was repeatedly reviewed without any objection by the ECJ.[75] If the Member States, before resorting to enhanced cooperation, were to conclude a legislative procedure, the question would arise to what extent the new secondary legal acts are still bound to the old, refused proposal. If a failed proposal was an absolute requirement, the new acts would have to be predetermined by the old proposal, since otherwise the failed procedure could be on one subject and the enhanced cooperation on another. Thus, the participating Member States would (to some extent) be bound to a proposal that was potentially influenced

[71] Ibid.; Similarly Bernd Martenczuk, *Enhanced Cooperation*, p. 88.
[72] CONV 23/03, p. 18.
[73] See also Steve Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation*, p. 348; Daniel Thym, *Supranational Differentiation and Enhanced Cooperation*, p. 859.
[74] Art. 329 TFEU: "Authorisation to *proceed* with the enhanced cooperation"; also, the authorising decision is taken by QMV, even in fields where unanimity is required (Art. 329 (1) TFEU); hence, there must be two distinct decisions.
[75] ECJ, C–146/13 (*Spain v Parliament/Council*), ECLI:EU:C:2015:298; C-147/13 (*Spain v Council*), ECLI:EU:C:2015:299; Emanuela Pistoia, *Outsourcing EU Law While Differentiating European Integration: The Unitary Patent's Identity in the Two "Spanish Rulings" of 5 May 2015.*.

by positions of non-participating Member States - a situation that contradicts the very idea of enhanced cooperation.

Finally, although enhanced cooperation is most likely in fields where unanimity is required and accordingly with limited Parliament involvement, it could as well occur in fields with obligatory Parliament involvement or even ordinary legislative procedure. Since the Council is allowed and encouraged to work on proposals before the Parliament adopted its position,[76] there is no reason why it should be obliged to first officially let a procedure fail, significantly slowing down the process due to potential delays when waiting for the Parliament's position, if it is sufficiently clear that the necessary majority for a uniform solution will not be reached.

Hence, it becomes clear that a complete, formal legislative procedure cannot be considered obligatory under the Treaties. At the same time, in order to rule out the possibility of a solution by the Union as a whole, *some procedure* in the Council needs to precede enhanced cooperation authorisation.

This view is generally shared. *Cannone,* for example, considers a "general discussion on the subject" in the Council to be sufficient,[77] which hardly provides working guidelines. *Martenczuk,* in this context, argues convincingly that it seems difficult to claim that all possibilities for compromise have been exhausted without a substantive discussion in *all instances* of the Council, including the political level.[78] As laid out above, it must be possible to resort to enhanced cooperation without unsuccessfully concluding an entire legislative procedure, taking into account the will of the Treaty legislators and the ECJ interpretation. Yet, even then, to respect the Court's requirement that not all fruitless negotiations can lead to enhanced cooperation and to ensure the necessary level of security that a compromise cannot be reached, the last resort criterion should be interpreted as requiring *at least one discussion on the ministerial level*, provided that this brings about sufficient clarity about the Member States' positions.[79] This appears to be a convincing, stringent middle way to ensure that the Council can

[76] ECJ C-412/93 (*Parliament v Council)*, ECLI:EU:C:1995:127, para 10-11.
[77] Andrea Cannone, *Le cooperazioni rafforzate*, p. 74.
[78] Bernd Martenczuk, *Enhanced Cooperation*, p. 89; however, Martenczuk considers a Commission proposal to be obligatory.
[79] Ibid., p. 89.

soundly establish the impossibility of a uniform solution without being bound to excessive procedural requisites not foreseen in the Treaties.

This finding could become particularly important in the case of particular urgency ('fast track' enhanced cooperation). In a situation in which it becomes clear at an early stage that the necessary majority for uniform EU action cannot be found, and the willing Member States are nonetheless interested in a swift procedure leading to an EU law solution, the Council could, after thorough and detailed discussion up to the ministerial level, combine a request to the Commission under Art. 241 TFEU and a request to start an enhanced cooperation according to Art. 329 (1) TFEU in an attempt to 'fast track' the enhanced cooperation procedure. Especially in situations in which prompt action is deemed essential (the situation leading to the adoption of the intergovernmental Fiscal Compact comes to mind), this could constitute a way to keep Member States from acting outside the Treaty framework and allow them to profit from the EU Institutions. In light of the duty to respect other Member States in the enhanced cooperation procedure (Art. 326 f. TFEU), and enforceability of this duty via the ECJ, this option should be in the interest of both participating and non-participating Member States.

2.3.3 Conclusions

The last resort criterion makes it clear that "enhanced cooperation is not a normal mode of functioning of the EU".[80] It is crucial that Member States explore the possibilities to find a uniform solution as thoroughly as possible. However, requiring a previous, failed legislative procedure does not automatically guarantee such thorough exploration. In cases of urgency, such an approach can excessively slow down the process and lead to Member States legislating outside the Treaty framework.

While working jointly on a concrete commission proposal should continue to be the rule, in certain situations, Member States might have to, and can legally, choose a faster procedure if the Member States' positions (particularly of those not wanting to participate in a project) are sufficiently clear. Moreover, rather than awaiting a Commission proposal on a given topic to

[80] Ibid., p. 87.

debate it, Member States can discuss it in the framework of the Council's 'indirect right of initiative'. If it becomes clear in such a setting that some Member States would only approve a measure "over my dead body",[81] while others deem the measure indispensable, they can move on to enhanced cooperation already at this stage. In the light of these findings, it becomes clear that enhanced cooperation could indeed be used in times of urgency and crisis.

As shown above, such an approach will be complemented by the ECJ staying on alert and being ready to step in should a misuse of this possibility occur.

However, in what is probably the most difficult situation, i.e. a situation in which Member States agree on a measure but not on its implementation, even more legal insights cannot take the burden of having to decide against certain Member States off the shoulders of the Council Members. The Court of Justice pointed out that this is legally possible. Nevertheless, it remains in any case a politically highly problematic decision and needs thorough prior discussions – if not for legal reasons, then for the sake of preserving cohesion between the Member States of the EU.

2.4 Outlook

As was shown above, enhanced cooperation can, despite having to be used as a last resort only, be applied in a wider area of scenarios than it may seem at first glance. It is likely that it will continue to be used as a "veto-buster"[82] when, in an advanced legislative process, Member States cannot agree on the details of a measure (like in the unitary patent case) or in cases where Member States 'agree to disagree', like in the family law related examples of the past. Moreover, as shown above, the mechanism could be applied in cases where there is particular urgency, as seen when the Member States had to react on the sovereign debt crisis. In all of these cases, the last resort criterion would not necessarily keep the Member States from resorting to enhanced cooperation.

[81] Steve Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation*, p. 348.
[82] Daniel Thym, *United in Diversity*, p. 1737.

One further question about future application of enhanced cooperation is whether it will keep being used only in fields governed by unanimity in the Council or whether Member States will also apply it in QMV scenarios. While not legally banned, this was not considered in practise yet.[83] The reason for this is probably a practical one: according to Art. 329 (1) TFEU and Art. 16 (3) TEU, the decision to authorize an enhanced cooperation is taken by a qualified majority in the Council itself. Hence, if the group of Member States interested in a measure is big enough to reach a qualified majority, then those states could have decided the measure as a legal act applicable to all Member States in the first place, even against the votes of some disagreeing countries. Even if they wanted to respect the dissenting states and legislate in an enhanced cooperation setting nevertheless, it could not be said that "it has [been] established that the objectives of such cooperation cannot be attained […] by the Union as a whole". Since the majority could outvote the minority, the objective could be attained by the Union as a whole and, therefore, enhanced cooperation would not be a last resort, making it illegal. Hence, the only scenario in which an enhanced cooperation in a field governed by QMV would be feasible would be if a group too small to form a QMV majority agreed on a measure, and at least one of the dissenting Member States voted yes on the authorisation decision to start enhanced cooperation while not joining them in the project itself. If the "helper-state" in this scenario was to join the enhanced cooperation at a later moment in time, it would be an easy target for anyone to call the whole procedure a hand trick to circumvent the last resort criterion. Therefore, timing would be crucial – the more time passes between the authorisation and joining, the less problematic the procedure would look from the angle of the last resort criterion.

As a side note, what needs to be kept in mind concerning QMV enhanced cooperation is that of course Member States which wanted a project and therefore joined an enhanced cooperation could be outvoted when it comes to its implementation in secondary law. Hence, a Member State could voluntarily join a project only to find that it is implemented in a way the state deems unacceptable. It is easy to imagine that Member States would join QMV enhanced cooperations more reluctantly than the ones governed by unanimity. Moreover, in this context,

[83] Steve Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation*, p. 348.

the questions of if and until when a Member State can withdraw from an ongoing enhanced cooperation would become highly relevant.[84,85]

To sum up, just like the other scenarios presented above, a QMV enhanced cooperation would be legally possible. Because of the different implications of QMV described above, QMV enhanced cooperations would likely be particularly dynamic when it comes to legislation and Member States joining or withdrawing.

As with the other scenarios that enhanced cooperation could be used in, the legal framework is in place, and the circumstances and developments in politics will show if they will eventually be used accordingly.

One thing remains clear, however: The last resort criterion may be easier to work with than some think, but it still serves its main purpose to protect the EU from a too easy and too regular use of differentiation, leaving single Member States excluded from the integration process. Within the framework of differentiation in EU law, it is a safeguard for overall cohesiveness in the integration process.

[84] On this controversial question, see e.g. Editorial Comments, *Enhanced cooperation: A Union à taille réduite or à porte tournante?*, p. 322 ff.; Hermann-Josef Blanke, *Art. 20 TEU*, para. 51; Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 276.

[85] In the case of a QMV enhanced cooperation, the qualified majority must be calculated differently since there are by definition less Member States in an enhanced cooperation than in the regular Council setting. Therefore, Art. 238 (3)(a) TFEU adapts the majority rules in that the majority must comprise at least 55% of the participating Member States comprising at least 65% of the population of these states. Minimum numbers, as foreseen for the regular QMV in Art. 16 (3) TEU, are dropped. The most relevant difference is that a blocking minority must comprise Council members representing more than 35% of the population of the participating Member States plus one State. Failing this, the qualified majority is deemed attained.

3 THE PRINCIPLE OF OPENNESS

3.1 Introduction

The principle of openness[86] is a defining element of enhanced cooperation. Its aim is to ensure the possibility for all Member States to join an ongoing enhanced cooperation at all times.

In the discussion of flexibility and differentiation in the EU, repeated reference is made to the idea, or danger, of creating a 'core Europe'.[87] This notion describes an inner circle of Member States which reach a deeper level of integration without all Member States participating. However, as opposed to notions such as multi-speed Europe or Europe of variable geometries, such a 'core Europe' would be defined by a certain degree of exclusiveness: It would not be for the non-participating Member States to decide whether or not they want to be part of the inner circle.[88] The principle of openness is the antithesis to this notion. According to it (Art. 20 (1) TEU, Art. 328 TFEU), enhanced cooperations shall be open for all non-participating Member States to join at all times, making the willingness to join and participate in the enhanced cooperation the main prerequisite. While some (objective) conditions can be applied, it is not for the Member States but for the Commission to decide upon the application of an interested Member State; a measure aimed at ensuring the neutral, non-political nature of the decision.[89] All of this shows that through its inherent openness, enhanced cooperation is designed to prevent Member States from creating exclusive cores within the EU and can rather be considered a mechanism allowing a multi-speed European integration with everyone ideally reaching the same level of integration eventually.[90]

The principle of openness does not only confer a right on non-participating Member States. According to Art. 328 (1) TFEU, participating Member States and the Commission "shall ensure that they promote participation by as many Member States as possible", obliging the involved actors at least in a limited way. Although the possibility to withdraw from an enhanced cooperation is being discussed,[91] it is not legally a part of the principle of openness.

[86] Not to be confused with openness in the sense of Art. 1 (2) TEU, see Alberto Alemanno and Oana Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, p. 97 ff.
[87] See e.g. Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 32 ff.
[88] Ibid., p. 54.
[89] Ibid., 55.
[90] Carlo Cantore, *We're One, but We're Not the Same*, p. 8 f.; Gerrit Linke, *Das Instrument der verstärkten Zusammenarbeit im Vertrag von Nizza*, p.109.
[91] See e.g. Editorial Comments, *Enhanced cooperation: A Union à taille réduite or à porte tournante?*, p. 322 ff.

The principle of openness is, in this sense, a one-way valve into enhanced cooperation, guaranteeing only that Member States which have not joined yet can do so.

The principle is subject to a number of formal and substantive constraints, i.e. procedures and conditions. Both have been explained before. However, the literature is still lacking a profound analysis of the criteria, as well as the implications that such an analysis reveals at the political level. Therefore, the following analysis will go deep into the details of the principle of openness while keeping an eye open for the broader picture of political questions in general, and the current challenges in particular. This will be done by analysing in depth, first, the procedure of Member States joining enhanced cooperation and, second, the limits and criteria that joining Member States can face.

3.2 Procedure

The general procedure to join an enhanced cooperation is laid down in Art. 331 TFEU. However, this concerns enhanced cooperations "in progress", i.e. once the decision authorising enhanced cooperation has been issued by the Council.[92] Nevertheless, there are several occasions prior to this in which Member States can undertake to join an enhanced cooperation procedure. Given that enhanced cooperation is designed to favour and promote participation by as many Member States as possible, it would contradict the mechanism's main philosophy if the principle of openness did not apply to Member States which wanted to join before the authorisation decision.

While Member States can, therefore, join enhanced cooperation procedures at any time during their trajectory from an initial request to the time after the passing of implementing legal acts, the procedure differs according to the exact phase in which the interest in participation is made known. Moreover, joining at different stages has different political implications for the joining Member States as they have more or less influence on the final legal nature of the enhanced cooperation, which comes with more or less certainty about what states commit to.

[92] Bernd Martenczuk, *Enhanced Cooperation*, p. 97.

Existing literature mainly differentiates between the time before and after the enhanced cooperation is "in progress" (Art. 331 TFEU), that is after the authorising decision has been issued.[93] To get a full picture, I will analyse all different stages (distinguishing five phases), name them, and point out their legal and political implications. This analysis draws, on the one hand, on a closer look on the factually different phases. On the other hand, I study the cases in which Member States joined enhanced cooperation projects in practice. Information on this can be obtained from the political situations in which Member States joined, the decisions confirming the participation, as well as application letters obtained through access to documents requests. As a final overview at the end of this chapter, Table 1 illustrates all instances in which Member States joined enhanced cooperations.

Five different phases in which States can join an enhanced cooperation can be distinguished: the phase leading up to the initial request ("Requesting Phase"); from the Member States' initial request to the issuing of a proposal for the authorising decision by the Commission ("Preparation Phase"); from the proposal for the authorising decision to its adoption by the Council ("Authorisation Phase"); from the authorising decision to the passing of implementing secondary law ("Implementation Phase"); after implementing secondary law has been passed ("Enactment Phase").

3.2.1 Phase 1: Requesting Phase

The requesting phase starts with the informal agreement of at least nine Member States to request an enhanced cooperation. Since the request to join merely requires a letter to the Commission in which a State voices its interest to join,[94] this phase is inherently open and access at this stage is unrestricted. Although a group of at least nine Member States is required, the established practice is that each Member State addresses an individual letter to the Commission, possibly with identical content in different languages.[95]

[93] E.g. ibid., p. 96 f.
[94] For examples, see Notification letters EPPO, Council, Doc. No. 8027/17.
[95] Ibid; see also Letters of Austria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia, Spain, and Bulgaria requesting enhanced cooperation on divorce and legal separation.

3.2.2 Phase 2: Preparation Phase - from the initial request to the proposal for an authorising decision

For the procedure to start, the Commission needs to present a proposal for a decision authorising enhanced cooperation to the Council.[96] Before the Commission first publishes this proposal, Member States which want to join the ongoing procedure still only need to notify the Commission of their intention to participate. In this case, the Commission treats the new member the same as the initial Member States who originally requested enhanced cooperation.

This procedure was used in all enhanced cooperations except the one on a financial transaction tax (for details, Table 1). As joining States are treated the same as the original States, they still have the maximum amount of influence on the procedure. Through their letters, they could try to make an influence on the content of the Commission's authorising decision, which predetermines the eventual enhanced cooperation and can be changed by the Council only by a unanimous decision (Art. 293 (1) TFEU, see below). An example of such influence could be an attempt to convince the Commission to include conditions for participation at a later stage (Art. 328 (1) TFEU). However, analysing the letters in two of the five occasions (including the special case of the European Public Prosecutor's Office), no attempt to use this influence could be found. This could change, however, in more controversial cases in future.

3.2.3 Phase 3: Authorisation Phase - from the proposal to the adoption of the authorising decision

After the Commission first publishes its proposal for an authorising decision, the procedure changes slightly. Since the authorising decision needs to be based on a Commission initiative, any change to the content of the proposed decision needs to be introduced through a formal amendment of the proposal.[97] The proposal can in principle be amended by the Commission or the Council (Art. 293 TFEU).

[96] This is exclusively at the Commission' discretion and was used in the past to slow down enhanced cooperation procedures significantly, see Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*, p. 210.
[97] See Editorial Comments, *Enhanced cooperation: A Union à taille réduite or à porte tournante?*, p. 321 f.

However, according to Art. 293 (1) TFEU, where the Council acts on a proposal from the Commission (like in the case of the authorisation decision), the Council may change the proposal only by acting unanimously. Since enhanced cooperation is regularly used where there is no unanimity, this is an unlikely scenario. In the ordinary legislative procedure, this is compensated by the opportunity to change the proposal later on, in interaction with the Parliament. However, the adoption procedure of an authorisation procedure is not an ordinary legislative proceeding (see Art. 329 (1) TFEU). Therefore, the remaining and significantly easier option is to change the proposal by a Commission decision according to Art. 293 (2) TFEU. The Commission can change the proposal at any time before the Council acted on the basis of the proposal.[98]

Interested Member States can address a request to change the proposed authorisation decision to the Commission. Although accession at this stage is not specifically foreseen in Art. 331 TFEU, states must have the same right to access (where applicable, subject to the same limitations) due to the general principle introduced by Art. 20 TEU and Art. 328 TFEU.

This approach was followed by Member States in the enhanced cooperation on divorce and legal separation, as well as on international couples' property regimes. A particularly interesting case regarding the political motivation to join in a specific phase is the case of Malta joining the enhanced cooperation on divorce and legal separation. Malta joined the procedure after a proposal for the authorisation decision had been published (March 2010) but before it was passed by the Council (July 2010). Malta's legal system, at that point in time, did not in any event foresee the possibility to get a divorce. Because it feared that the legislative project could circumvent this prohibition, Malta opposed it in the Council and helped to block the procedure.[99] When the remaining Member States decided to continue using the enhanced cooperation procedure, it joined the project in an apparent attempt to at least have an influence on the content, and indeed, it did manage to negotiate an exception for itself in the final regulation.[100] Before March 2010, there was no need for Malta to join the enhanced cooper-

[98] See Robert Böttner, *Eine Idee lernt laufen – zur Praxis der Verstärkten Zusammenarbeit nach Lissabon*, p. 513; Robert Böttner, *Ein scharfes Schwert der Kommission? Überlegungen zu Artikel 293 AEUV Böttner* points out that the amendment can even be made orally.
[99] Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*, p. 201.
[100] Art. 13 Council Regulation (EU) No 1259/2010.

ation because it seemed unlikely that the Commission would propose an authorisation decision to the Council at all.[101] When the proposal was eventually published, the Maltese government (led by the same party and Prime Minister as during the initial negotiations) needed to act quickly to join and maintain a seat at the negotiating table: From the moment of the authorisation on, a different procedure (described below, Phases 4 and 5) would have applied, in which stricter conditions apply for participation. It is unlikely that, under these circumstances, the Commission would have or even could have approved Malta's participation given that they lacked the most essential prerequisite, i.e. allowing divorces at all. Malta had a period of four months between the publication of the proposed authorisation decision and its adoption (see Table 1) and used this short time frame strategically.

Another interesting insight stems from Germany's letter trying to join the same enhanced cooperation (divorce and legal separation). In this document, the German Minister of Justice claimed that her country played a "substantial" role in the initial Council deliberations for a solution applicable to all Member States. Since she had "great interest" in participating in the deliberations in the enhanced cooperation framework, she explicitly asked the Commission to change its proposal in a way that Germany is included among the initial Member States – i.e. to let it join while the Authorisation Phase is still ongoing.[102] From this phrasing, it can be seen that indeed Member States have a great interest in joining enhanced cooperation while they still do not face any hurdles, as they would in the following phases. At the same time, like in the Maltese case, it is quite obvious that the German government wanted to see what the proposed authorisation decision looked like before joining the enhanced cooperation: Between the initial request and the publication by the Commission, almost two years passed in which Germany made no move towards joining the project. Once the draft authorisation decision was published, Germany requested to join within 20 days (see Table 1 below).

[101] Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*, p. 210.

[102] Letters of German Minister of Justice requesting to join the enhanced cooperation on divorce and legal separation, 15 April 2010; „Ich habe ein großes Interesse daran, auch an den jetzt im Rahmen der verstärkten Zusammenarbeit noch anstehenden Verhandlungen aktiv teilzunehmen. Ich bitte Sie daher, den vorliegenden Antrag noch in das gerade eingeleitete Verfahren einzubeziehen und Ihren Vorschlag für den Ermächtigungsbeschluss (COM (2010) 104), gegebenenfalls auch den Durchführungsbeschluss (COM (2010) 105), so zu ergänzen, dass auch Deutschland als Antrag stellender Mitgliedstaat erfasst wird."

3.2.4 Phase 3.5: The Odd Case of EPPO and 'Facilitated Enhanced Cooperation'

In the case of the European Public Prosecutor's Office (EPPO),[103] one would think that Latvia, Italy, Estonia, and Austria chose the course of action described above in the Authorisation Phase when they joined the project soon after the initial States and before any other action had happened (see Table 1). However, the EPPO is based on a different legal basis: Art. 86 (1)(3) TFEU refers to the enhanced cooperation procedure but modifies it so that the authorisation is "deemed to be granted" if the procedure of Art. 86 TFEU has been completed without success and interested Member States notify the Parliament, Council, and Commission of their willingness to proceed with enhanced cooperation. In this sense, the EPPO is a case of what can be called 'facilitated enhanced cooperation'. From the moment the authorisation is deemed to be granted, the ordinary enhanced cooperation rules apply. Because of the automatic authorisation, Phases 3 and 4 are not as easily distinguishable as in the normal enhanced cooperation procedure. The same procedure used for the establishment of the EPPO is foreseen in Art. 82 (3) TFEU (mutual recognition in criminal matters), Art. 83 (3) TFEU (substantial criminal law harmonization), and Art. 87 (3) TFEU (police cooperation) which have, however, not yet been used in practice.

If Member States decide to join such a facilitated enhanced cooperation before implementing law is passed,[104] the Treaties do not specify an accession procedure. Following the wording of the Treaties, it could be argued that since the authorisation decision is considered to be taken automatically with notification by at least nine interested Member States, the procedure automatically skips Phase 3 and goes straight to Phase 4. This would mean that the accession of Member States who want to join an enhanced cooperation just after the initial group (like Latvia, which joined the EPPO enhanced cooperation within the same month of the initial 16) would be subject to a positive decision of the Commission. However, it is the clear intention of the Treaty to facilitate enhanced cooperation in these instances by *avoiding* all kinds of authorisation or confirmation decisions. Hence, such an interpretation would hardly be in line with the *ratio* of the relevant Treaty provisions in the light of the principle of openness. Therefore, Art. 86 (1) TFEU (as well as Art. 82 (3), 83 (3), and 87 (3) TFEU, the so-called "accelerator

[103] On EPPO, see Willem Geelhoed, Leendert H. Erkelens and Arjen W.H Meij, *Shifting Perspectives on the European Public Prosecutor's Office*.

[104] Once implementing law exists, it is clear that Art. 331 TFEU applies for accessions.

clauses"[105]) should be interpreted as allowing Member States to join ongoing facilitated enhanced cooperations which have not yet resulted in implementing legal acts by a notification of the Parliament, Council, and Commission.

This, indeed, was the practice of participating and interested Member States as well as the institutions pursued in the case of the EPPO when Latvia, Italy, Estonia, and Austria indicated their wish to participate before implementing legal acts were passed.[106]

3.2.5 Phase 4: Implementation Phase – from the authorising decision to implementing secondary law

Once the authorisation decision is passed, the enhanced cooperation can be considered as "in progress", triggering the applicability of the procedure laid out in Art. 331 TFEU.[107] Hence, interested Member States need to first notify their intention to the Council and the Commission. The Commission examines if all the conditions for participation (see below) are met and then, ideally, confirms the participation of new Member States within four months. If not, the Commission indicates measures to be taken by the concerned Member State and sets a deadline for the re-examination of the request. After this deadline, the Commission repeats its examination and either confirms the participation or, if negative, forwards the request to the Council. The Council can then confirm or decline the request, with the votes of the participating Member States only.

If the participation is confirmed before any implementing secondary law is passed, the affected Member State gains the opportunity to co-decide these measures and thus influence their content. This is a political advantage. Moreover, it does not fall under the Commission's jurisdiction to adopt transitional measures for the enactment of the implementing law. Despite this more favourable position compared to an accession in Phase 5, no Member State has joined an enhanced cooperation in the Implementation Phase yet. In some cases, this might be due to the fact that implementing legislation was passed shortly after the authorising decision (International Couples' Property). Moreover, it is to be noted that in the enhanced cooperation on a financial transaction tax, no implementing law has been passed yet, meaning

[105] Hermann-Josef Blanke, *Art. 20 TEU*, para. 20.
[106] Council Regulation (EU) 2017/1939, para. 8.
[107] Bernd Martenczuk, *Enhanced Cooperation*, p. 97.

that the procedure is still in the Implementation Phase, and states could join should there be movement in the negotiations.

3.2.6 Phase 5: Enactment Phase - after the passing of implementing law

After the initial Member States have passed legal acts implementing the enhanced cooperation, the accession procedure is largely the same as in the Implementation Phase, before the existence of implementing law. The main difference is that newcomers need to also introduce the implementing law to their legal systems. For this reason, the Commission may adopt transitional measures it deems necessary for the implementation (Art. 331 (1) TFEU).

If, after a repeated negative decision on the participation by the Commission due to the non-fulfilment of the participation requirements, the responsibility for the decision passes on to the Council, the competence to adopt transitional measures is equally transferred to the Council although the Council can only adopt measures on a proposal from the Commission. In the past, the adopted measures consisted of transition periods (delayed entry into force, initially limited application, etc.).

So far, Member States successfully joined enhanced cooperations in the Enactment Phase on four occasions: Lithuania, Greece, and Estonia were subsequently added to the list of states participating in the enhanced cooperation on divorce and legal separation, and Italy joined the unitary patent (see Table 1). These can most clearly be described as the cases in which states changed their mind and joined a project, strengthening the notion of enhanced cooperation as a multi-speed instrument that, in the long run, leads to more overall integration. In all of these cases, there were no general conditions for participation foreseen in the projects. The transitional measures in all cases mirrored, in substance and timespans, the transitional measures for the initial Member States in the implementing legal acts.[108] In addition, the Netherlands and Malta joined the facilitated enhanced cooperation on the European Public Prosecutor's Office. In both cases, no transitional measures were deemed necessary.[109]

[108] See Commission Decision 2012/714/EU, Commission Decision 2014/39/EU, Commission Decision (EU) 2016/1366, and Commission Decision (EU) 2015/1753.
[109] Commission Decision (EU) 2018/1094 and Commission Decision (EU) 2018/1103.

A different situation might arise if enhanced cooperation were to be applied in a case governed by QMV. Even in the cases where unanimity is needed, Member States are staying away from differentiating in projects in order to first see the eventual implementing law and then decide on their participation.[110] Given this, Member States could fear all the more to be bound by implementation laws passed against their will in cases governed by QMV. Therefore, more Member States could decide to wait and see the final acts before making a decision about their accession to the enhanced cooperation.

[110] See the example of Estonia in the EPPO, https://news.err.ee/591270/estonia-not-in-hurry-to-join-european-public-prosecutor-s-office (accessed 20.07.2018), and Malta in PESCO, https://www.maltatoday.com.mt/news/europe/83085/malta_to_wait_and_see_before_deciding_on_pesco_defence_pact_muscat_says (accessed 20.07.2018).

Table 1: Participation in enhanced cooperation projects

Project	**Request Phase** Initial Member States	**Preparation Phase** Before proposal for authorisation	**Authorisation Phase** After proposal, before authorisation	**Implementation Phase** After authorisation, before law	**Enactment Phase** After adoption of implementing law
Divorce and Legal Separation Authorisation Decision (Commission: March 2010) Council: July 2010 Implementing law: December 2010	July 2008 Austria, (Greece,) Hungary, Italy, Luxembourg, Romania, Slovenia, and Spain[111]	August 2008: Bulgaria January 2009: France	April 2010: Germany, Belgium May 2010: Latvia, Malta June 2010: Portugal	-	November 2012: Lithuania January 2014: Greece August 2016: Estonia
Unitary Patent Authorisation Decision (Commission: December 2010) Council: March 2011 Implementing law: December 2012	December 2010: Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden, and the United Kingdom	December 2010: Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania, and Slovakia[112]	-	-	September 2015: Italy
Financial Transaction Tax Authorisation Decision (Commission: December 2012) Council: January 2013	September/October 2012: Austria, Belgium, Estonia,[113] France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia, and Spain	-	-	-	-
International Couples' Property Authorisation Decision (Commission: March 2016) Council: June 2016 Implementing law: June 2016	December 2015: Malta, Croatia, Belgium, Germany, Greece, Spain, France, Italy, Luxembourg, Portugal, Slovenia, Sweden	January 2016: Czech Republic February 2016: The Netherlands, Bulgaria, Austria, and Finland	March 2016: Cyprus	-	-
European Public Prosecutor's Office Notification instead of authorisation decision: April 2017 Implementing law: October 2017	April 2017: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain	April 2017: Latvia June 2017: Estonia, Austria, and Italy	-	-	August 2018: Netherlands, Malta

[111] Note that this took place before the entry into force of the Lisbon treaty. Therefore, the initial number of 8 Member States was sufficient to launch enhanced cooperation. Greece withdrew its request in March 2010.
[112] All requests were submitted before the Commission adopted a proposal for the authorising decision.
[113] Estonia subsequently withdrew from participating.

Table 1 - Sources:

Divorce and Legal Separation:
Authorisation Decision: Council Decision 2010/405/EU, esp. para 5.
Implementing Law: Council Regulation (EU) No 1259/2010.
Commission Decisions on Participation: Commission Decision 2012/714/EU (Lithuania); Commission Decision 2014/39/EU (Greece); Commission Decision (EU) 2016/1366 (Estonia)

Unitary Patent:
Authorisation Decision: Council Decision 2011/167/EU, esp. para 5.
Implementing Law: Regulation (EU) No 1257/2012.
Commission Decisions on Participation: Commission Decision (EU) 2015/1753 (Italy).

Financial Transaction Tax:
Authorisation Decision: Council Decision 2013/52/EU, esp. para 6.

International Couples' Property Regimes:
Authorisation Decision: Council Decision (EU) 2016/954, esp. para 5.
Implementing Law: Council Regulation (EU) 2016/1103 and Council Regulation (EU) 2016/1104.
Commission Decisions on Participation: Commission Decision (EU) 2018/1094 (Cyprus).

European Public Prosecutor's Office:
Notification letters: Council, Doc. No. 8027/17.
Implementing Law: Council Regulation (EU) 2017/1939, esp. para 8.
Commission Decisions on Participation: Commission Decision (EU) 2018/1094 (Netherlands); Commission Decision (EU) 2018/1103 (Malta).

3.3 Limits on Openness – Compliance, Conditions… and Conditionalities?

Its inherent openness is fundamentally important for enhanced cooperation. Nevertheless, the openness is not unlimited – indeed, participation of interested Member States can be made dependent on three types of requirements. Firstly, newly joining Member States need to adapt their legal systems to the enhanced cooperation if any legal acts have already been passed in the differentiated framework. Secondly, conditions for participation can be introduced in the authorisation decision or the implementing legal acts. Thirdly, it can be argued that there is an unwritten category of requirements, centering around a sincere willingness to cooperate.

While all of this has been written about before, many aspects have not been or not been sufficiently dealt with yet. Firstly, I already suggested above that the different limits have impacts on the moments in which the political will is strong enough to convince a Member State to join an ongoing enhanced cooperation. Therefore, the greater attention paid above to the stages in which Member States can join will now be reflected upon with a greater attention to the political implications of the different limits. Moreover, when it comes to unwritten requirements, the practical application of the enhanced cooperation mechanism has produced some new evidence of such limitations, which I will introduce below. Finally, the possibility for enhanced cooperation Member States to introduce conditions for participation could in future, especially in the light of the crises the EU is facing, be used to incentivise other States in different ways. This would change the nature of the conditions towards being *conditionalities*. While this has not been discussed in the literature yet, I will show that the treaties do not in principle prohibit such a use of the possibility to introduce conditions.

3.3.1 Compliance with legislation

If Member States adopt law in the framework of an enhanced cooperation, it does not become part of the *acquis communautaire* as it is only applicable to the participating Member States. However, the purpose and advantage of enhanced cooperation is that for the participating states, the implementing law has the same value and function as regular EU law, becoming what has been referred to as "partial acquis".[114] Hence, first and foremost, new Members

[114] Hermann-Josef Blanke, *Art. 20 TEU*, para. 47.

must comply with all legal acts already adopted in the enhanced cooperation (Art. 328 (1) TFEU). The implementing law could be changed to accommodate new Member States; however, it is the norm that newcomers adopt the existing law as it stands and only get a say in future developments.[115]

The practice (Table 1) shows that the Commission routinely makes use of its jurisdiction to adopt transitional measures to this end. In all cases where such measures were adopted in practice, they mirrored, in substance and timespans, the transitional measures for the initial Member States, foreseen in the implementing legal acts. However, the open wording of Art. 331 (1) TFEU and the fact that such measures are only for the Commission to decide, illustrate that the Commission has the power to influence when and how a Member State joins the enhanced cooperation through transitional measures. This can be an incentive for a Member State to join enhanced cooperations as soon as possible.

The example of Malta[116] (see above, Authorisation Phase) once more exemplifies the relevance of the need to comply with passed legislation for a newly joining state. Had Malta not joined the enhanced cooperation on divorce and legal separation before it was authorised and implementing law was adopted, it could not have negotiated an exception for it not allowing divorces. Under this circumstance, they could not have satisfied the accession condition to comply with implementing law and, hence, could not have joined the enhanced cooperation.[117]

3.3.2 Unwritten Limits

The Principle of Openness is designed as a safeguard against the misuse of enhanced cooperation by Member States which want to exclude another Member State from participating in a measure. However, the principle could itself be misused: The declared aim of enhanced cooperation is to have as many Member States as possible participate. Participating Member States must, wherever possible, promote participation, and the wording of the Treaties only limits

[115] Ibid., para. 49.
[116] Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*, p. 201.
[117] At least until 2011 when Malta introduced the possibility of divorce after a referendum.

the openness in terms of conditions and compliance with passed law (Art. 328 (1) TFEU). Given all this, it would be an obvious tactic for a Member State which is opposed to an enhanced cooperation to *join* it and influence it from the inside. In fact, enhanced cooperation has, until this day, only been used in cases which require unanimity in the Council. In such cases, dissenting Member States could join the enhanced cooperation and then continuously veto the implementing law. Such tactics have been labelled "Trojan horse" or "deadly embrace".[118] Given the possibility of such blockages, the question arises if the right to participate conferred by the principle of openness is really unlimited, or whether Member States or institutions can act to prevent such a "deadly embrace", or even to end it once it has occurred.

The purpose of enhanced cooperation is to allow flexibility. Member States are not supposed to be overly limited in their capacity to legislate on an EU level even if only a (larger) group of them can agree on any given path. While the procedure is not limited to unanimity situations, it is particularly in situations in which very few Member States impede progress that such a "veto-buster"[119] is necessary, and which lead to the introduction of enhanced cooperation in the first place. Therefore, a "deadly embrace" tactic would be an obvious contradiction to the purpose of enhanced cooperation. Rather than allowing flexibility, it would just move blockages to a different level. Therefore, it cannot be claimed that a limitless right to join enhanced cooperations reflects the telos or the history of the Treaties.

In the past, several authors thought about an unwritten limit on the openness of enhanced cooperation for this reason and came to similar, yet not identical results. What has not been done yet, however, is to look into the practise to investigate if there are signs confirming the existence of such an unwritten limit or how it would be used practically.

Therefore, it is useful to explore the ideas in the literature to understand what claims have been made exactly, which I will do in a first step. Afterwards, I will confront these claims with findings from different documents issued in enhanced cooperation procedures as well as the political background of these to see if the initial claims can be upheld.

[118] Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation* p. 221 ff.; Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 57;
[119] Daniel Thym, *United in Diversity*, p. 1737.

3.3.2.1 Unwritten Limit on Openness - Literature

Von Buttlar claims that the problem can only arise before implementing law has been passed in an enhanced cooperation, since afterwards Member States have to comply with the *partial acquis* already passed in the enhanced cooperation framework. Therefore, according to him, Member States have an unlimited right to join enhanced cooperations after implementing law was passed, while before that the project is only open to them if they are *actually* willing to accede to the project in the sense of the initial Member States.[120] However, this underestimates the variety of situations that can occur. While it may (until today) be the rule that the aim of an enhanced cooperation is accomplished by passing one single legal act without amending it further, in one out of four cases, one act did not suffice (international couples' property regimes, see Table 1 above). Moreover, there could always be the need for further amendments or changes. In such a situation, an utterly uncooperative Member State could prove to be just as obstructive. Therefore, the limitation must be broader than depicted by *von Buttlar*. In this sense, *Thym* argues that the right to participate in an enhanced cooperation is limited in any stage, and that the EU organs in each accession have the possibility to verify if the interest in joining is due to a *sincere willingness to participate* or is only fuelled by the intention to block implementing law in the sense of "deadly embrace".[121]

According to *Becker*, there is a limitation on the openness whenever participation in an enhanced cooperation would amount to *misuse*. In these cases, the concerned Member State does not have a right to participate. However, *Becker* recognises that in most cases, such misuse will only be established retrospectively. Therefore, *Becker* additionally acknowledges a possibility to exclude the misusing Member State.[122]

Linke points out that this creates a tension with Member States who sincerely want to participate in a measure but cannot agree with the other Member States on the way it is to be implemented (as seen for example in the enhanced cooperation on a unitary patent where Spain and Italy agreed on the need for a patent but not on its working languages). In such cases, the concerned Member State could join the enhanced cooperation and then block its

[120] Christian von Buttlar, *Rechtsprobleme der "verstärkten Zusammenarbeit" nach dem Vertrag von Nizza*, p. 673 f. and 675.
[121] Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 57 and 249.
[122] Ulrich Becker, *Art. 20 EUV, Art. 326-334 AEUV*, Art. 328 para. 8. and Art. 331 para. 11; similarly Armin Hatje, *Art. 20 EUV, Art. 326-334 AEUV*, Art. 328 AEUV para. 2.

implementation to force the others towards its favoured way of implementation. However, while the Member State may sincerely want the measure, the enhanced cooperation mechanism is based on the idea that in some cases, consensus cannot be reached among the Member States, either on a measure or its implementation. Given that under the *last resort* principle the states must do everything that is reasonable to try and find a compromise, in the absence of it, different views on the implementation of a measure are not a sign of lacking openness when a project is eventually implemented in one way and not the other.[123]

3.3.2.2 Unwritten Limit on Openness – Practice

As usual, when enhanced cooperation is concerned, most literature is from the time before the procedure was actually enacted in practice for the first time. Consequently, the question arises if the practice confirms the literature's claims that there is an unwritten limit on the principle of openness.

First of all, it must be noted that until now the Commission confirmed participation or changed its proposal to this effect in all cases in which Member States wanted to join an enhanced cooperation. So, regardless of whether an unwritten limit exists, it did not need to be used until now.

That being said, most insights on this topic can be derived from the Commission's decisions in the cases in which it confirmed the subsequent participation of a Member State to an ongoing enhanced cooperation. In these decisions, the Commission had to describe what it verified beforehand. Among such decisions, the cases in which no implementing law was passed yet would surely be the most insightful, since in these cases the "deadly embrace" poses the biggest challenge to the projects. However, as showed before, in most of these cases, the Commission merely changes its proposal and therefore does not issue a written decision confirming participation (this is true for the Request Phase, Preparation Phase, and Authorisation Phase). In the Implementation Phase, a written Commission decision would be required for a Member State to join, but this has not happened yet. Therefore, the available decisions are the ones from Member States joining in the Enactment Phase, i.e. after implementing law has been passed. So far, four such decisions have been issued in regular enhanced cooperations

[123] Gerrit Linke, *Das Instrument der verstärkten Zusammenarbeit im Vertrag von Nizza*, p. 110.

and two in a facilitated enhanced cooperation.[124] If the Commission had stuck closely to the black letter legal requirements foreseen in Art. 328 (1) TFEU, it would have only had to note the absence of (written) conditions in the authorisation decision and specific prerequisites in the implementing law, while the compliance with the implementing law would be ensured through transitional measures. However, the wording that the Commission used in every one of the four regular enhanced cooperation decisions was:

> *The Commission notes that neither [AUTHORISATION DECISION] nor [IMPLEMENTING LEGAL ACT] prescribe any particular conditions of participation in enhanced cooperation in the area of […] and that [MEMBER STATE]'s participation should strengthen the benefits of this enhanced cooperation.*[125] (emphasis added)

Given the continuous usage of the expression "that [Member State]'s participation should strengthen the benefits of this enhanced cooperation", the Commission apparently tested more than just the existence of written criteria. In different language versions, this seems even clearer.[126] If an enhanced cooperation is to *benefit* from a Member State's participation, the State clearly cannot be planning a "deadly embrace" of the project. The Commission carries out a benefit assessment of a Member State's participation in an enhanced cooperation, the core of which logically must be its sincere willingness to cooperate in the project, since its absence would pose the biggest conceivable *dis*benefit.

It needs to be added that no trace of such a benefit assessment can be found in the Commission decisions confirming the participation in the facilitated enhanced cooperation on EPPO. This can be understood as a more restrained approach by the Commission, mirroring its more limited role in setting up facilitated enhanced cooperations.

Regarding the Commission's approach in regular enhanced cooperations, however, it is again informative to look at the case of Malta in the enhanced cooperation on divorce and legal

[124] Three in the enhanced cooperation on divorce and legal separation, one on the unitary patent, and two in the facilitated enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).
[125] Commission Decision 2012/714/EU para 4 (in this case, the Commission only mentioned the authorisation decision); Commission Decision 2014/39/EU para 5; Commission Decision (EU) 2016/1366 para 6; Commission Decision (EU) 2015/1753 para 5.
[126] German: "[…]dass die Teilnahme […] [an] dieser Verstärkten Zusammenarbeit förderlich wäre", that the participation would be benefitial; Italian: "[…]che la partecipazione […] rafforzerà i benefici di detta cooperazione rafforzata", that the participation *will* strengthen the benefits.

separation law (see above, Authorisation Phase and Compliance with passed legal acts). Malta's legal system did not foresee the possibility to get a divorce. To maintain this status, it vetoed the legislative project on harmonizing access to Courts in such cases. When the majority of the remaining Member States decided to proceed using the enhanced cooperation procedure, Malta joined and obliged the participating Member States to include an exception for its benefit in the implementing regulation.[127] Malta thus refrained from "deadly embracing" the project and settled for a special clause to protect its interest.

In its letter notifying its intention to join the enhanced cooperation, it pointed out that it would "seek assurance that its particular position on divorce is safeguarded in the text of the Council regulation", which indeed happened eventually.[128] However, the Commission could not be sure of this at the time of confirming Malta's participation. On the one hand, this strengthens the expectation raised in the past that the Commission will be extremely careful when exercising its benefit assessment.[129] On the other hand, this could point towards the existence of a possibility to reverse the accession confirmation by the Commission.

3.3.2.3 Conclusions on Unwritten Limits

In conclusion, both theory and practice point towards an unwritten limit on the principle of openness. The Commission tests broadly if the participation of a Member State benefits the project, and it remains somewhat unclear what is assesses in this context. It should be pointed out though that the Commission, like the Member States, is bound by (and, as shown for example in the example of Malta, committed to) the duty to promote participation by as many Member States as possible (Art. 328 (1) TFEU). There are scenarios in which the participation of more Member States makes an enhanced cooperation objectively work less well, for example, by creating less economic benefits.[130] In such cases, it can be said that the participation of certain states is not actually beneficial. However, the clear Treaty provision in Art. 328 (1) TFEU bans the possibility of excluding the Member States in such a scenario.

[127] Art. 13 Council Regulation (EU) No 1259/2010.
[128] Letter by the Permanent Representation of Malta to the European Union (PR 550/10), 31 May 2010.
[129] Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 57 and 249; Giorgio Gaja, *How Flexible Is Flexibility Under the Amsterdam Treaty?*, p. 860 f.; Marize Cremona, *Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU*, p. 5 ("weighted in favour of inclusion").
[130] See e.g. the different scenarios for a Common Consolidated Corporate Tax Base in Leon Bettendorf et al., *Corporate Tax Consolidation and Enhanced Cooperation in the European Union*.

Hence, it becomes even more clear that the core of the benefit assessment, and thus of the unwritten limitation on the principle of openness, is the assessment of a sincere willingness to cooperate in the differentiated integration measure. The reason for this unwritten limit can be found, as described above, in the nature of enhanced cooperation and its aim to facilitate flexibility and circumvent persistent vetoes in certain scenarios. However, the legal foundation for it can be seen in the principle of sincere cooperation (Art. 4 (3) TEU)[131].[132] Where Member States are obliged to cooperate sincerely and loyally with the Institutions and the other Member States,[133] they cannot block others when they legally choose a path that does not include all states to pursue the objectives of the Union.

The sincere willingness to cooperate entails a general willingness to participate, i.e. agreement on the necessity of the measure as well as a general agreement on the way it is thought to be implemented. The latter is particularly relevant if this was what led to the usage of enhanced cooperation (like in the unitary patent case). This shows that the unwritten limit always operates on a thin and delicate line between preventing "deadly embraces" by uncooperative Member States and the preclusion of a healthy political debate on the implementation of the enhanced cooperation.

In this context, it is particularly difficult to answer what happens when a Member State joins an enhanced cooperation without the sincere willingness to cooperate, i.e. when the Commission's benefit assessment fails and an enhanced cooperation member consistently blocks the progress of the procedure. *Becker* proposes that in this case, a Member State can be excluded from the enhanced cooperation.[134] He does not explain how this exclusion would come to be in practice, particularly who would decide on the measure.

It is true that an enhanced cooperation project could be jeopardized by Member States joining and blocking the adoption of implementing law, that this danger cannot be excluded completely by the benefit assessment that the Commission carries out beforehand, and that the Commission's behaviour in the case of Malta regarding the enhanced cooperation on divorces and legal separation might point toward it assuming to have a possibility to intervene at a later

[131] Hermann-Josef Blanke, *Art. 4 TEU* , para. 81 ff.
[132] Editorial Comments, *Enhanced cooperation: A Union à taille réduite or à porte tournante?*, Fn. 13; Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 57.
[133] Hermann-Josef Blanke, *Art. 4 TEU*, para. 83.
[134] Ulrich Becker, *Art. 20 EUV, Art. 326-334 AEUV*, Art. 328 para. 8. and Art. 331 para. 11.

stage in the process, if necessary. However, the comparison with another differentiation mechanism foreseen by the Treaties, PESCO, challenges the claim that there is an unwritten exclusion mechanism from enhanced cooperation. In PESCO ('Permanent Structured Cooperation' in defence policy), which is distinct from enhanced cooperation but largely resembles it,[135] the participating Member States can suspend the membership of another participant by a qualitative majority decision in the Council (Art. 46 (4) TEU).[136] Given this clear statement and a written Treaty basis in a similar procedure, it is difficult to argue that such a provision is intended but not explicitly included in the Treaties for enhanced cooperation. What could be conceivable, however, is a slightly different approach from a right to exclude an uncooperative Member State: Since the participation in enhanced cooperation is subject to the fulfilment of certain criteria, and one of them is the sincere willingness to cooperate, one could claim that where a Member State indeed uses its membership only to block an enhanced cooperation, the criteria were never fulfilled in the first place. In the light of this, and of the importance of this criterion, it can be argued that the conditions were just never met – and that, therefore, the Commission decision confirming the participation must be declared invalid *ex ante*, annulling the participation of the concerned state from the outset. This is not an entirely new idea: In fact, a similar argument has been made for the participation of Greece in the EMU, which was based on inaccurate fiscal statistics.[137] Assuming that this is possible, *ex ante* invalidity of the participation would have to be established by the institution(s) responsible for the participation of the not sincerely willing Member State, i.e. the Commission, at any moment after the authorisation decision has been adopted by the Council (Implementation Phase or Enactment Phase). [138] Before this, it could be argued that the decision must be taken by the actors involved in passing the authorisation decision which the concerned Member State becomes part of, i.e. the Commission, the Council (in an analogy to Art. 329 (1)(2) TFEU with QMV in the enhanced cooperation setting), and with consent of the Parliament. Of course, this would

[135] In fact, enhanced cooperation could be used on defence matters (Art. 329 (2) TFEU). However, PESCO provides Member States with more liberty and less rigid conditions than enhanced cooperation would.
[136] Sven Biscop, *European Defence: Give PESCO a Chance*, p. 165 f.
[137] Steve Peers, *The law of Grexit: What does EU law say about leaving economic and monetary union?*; see also: Charles Proctor, *The Future of the Euro - What Happens if a Member State Leaves?*, p. 935 f.; Joseph Blocher, G. Mitu Gulati and Laurence Helfer, *Can Greece Be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations*.
[138] Similarly for the older Art. 11 ECT: Armin Hatje, *Art. 11 EGV*, Art. 11 EGV para. 31.

only be possible if more than the nine Member States were left afterwards to make the enhanced cooperation continue. It goes without saying that the operation to conclude that a Member State's participation is only based on the intention to veto implementing legal acts would be extremely delicate and difficult. The only aid when doing so could be drawn from the Council material on the verification of the last resort-criterion. In fact, the only case in which it would be somewhat easy to verify that a state joined an enhanced cooperation for uncooperative purposes would be if a Member State brought back up the discussions which led to the conclusion that a uniform solution could not be found.

A Member State left out after such a decision could resort to an action for annulment before the Court of Justice (Art. 263 TFEU). Likewise, the Council could, at least in theory, seek to annul a Council decision confirming the participation of a Member State.[139]

3.3.3 Written Conditions and Conditionality

The Treaty of Lisbon for the first time gave Member States the possibility to make participation dependent on the fulfilment of certain criteria. For that purpose, "conditions of participation" can be laid down in the authorising decision according to Art. 328 (1) TFEU. While limiting the openness of enhanced cooperations to some extent, this option is regarded as a means to strengthen the enhanced cooperation mechanism by giving participating Member States some control over accessions through objective criteria, while avoiding less objective, politicised Council decisions on accession.[140] Nevertheless, until today, no such condition was used in practice. All authorisation decisions were limited to the mere triggering of enhanced cooperation.

However, unity in the EU has been under attack in recent times. This practise might therefore change in the near future. Serious disagreement on various questions regarding the EU could

[139] Sebastian Zeitzmann, *Das Verfahren der Verstärkten Zusammenarbeit und dessen erstmalige Anwendung: Ein Ehescheidungs- und Trennungsrecht für Europa*, p. 100.
[140] Hermann-Josef Blanke, *Art. 20 TEU*, para 36.

lead to a more frequent use of enhanced cooperation. In an atmosphere of disunity and lacking cooperation, Member States might feel the need to ensure the functionality of such enhanced cooperation projects by introducing conditions to govern participation.

Prima facie, one would expect these conditions to be straight forward criteria, like the participation in the Euro or Schengen, to name but a few possibilities. However, the conditions could also be very different in nature. This is due to another topic that has been generating renewed interest in the light of the different recent European crises: the idea of conditionality, i.e. connecting a benefit to a country's fulfilment of certain policy requirements. In the Eurozone crisis, active use has been made of conditionality as a policy tool. In the current rule of law crisis, voices from all directions demand the use of conditionality to ensure core values. Therefore, the current situation calls, on the one hand, for renewed attention to the *conditions* enhanced cooperation can be made dependent on. On the other hand, it is worth exploring if the *conditions* can amount to *conditionalities* and how far enhanced cooperation conditionality can go.

Enhanced cooperation conditions have so far been living largely in the shadow, which is why there is little literature on the topic, making an analysis worthwhile. Using the conditions as conditionalities, on the other hand, has not been analysed at all to this day. However, conditionalities offer a great deal of political leverage. For this reason, it is well worth looking into the possibilities hidden in the enhanced cooperation mechanism.

3.3.3.1 Conditions vs Conditionalities

As a first step, I want to explore the differences between conditions and conditionalities. A condition can be defined as "a situation that must exist before something else is possible or permitted".[141] A conditionality, on the other hand, is a condition that has additional features.

According to *Viţă*, two core features distinguish conditionalities from mere conditions: Firstly, the conduct prescribed by a conditionality must pursue a policy objective which goes beyond the primary purpose. Secondly, there must either be a sanction or an incentive attached to

[141] Angus Stevenson, *Oxford Dictionary of English*.

the (non-)fulfilment of the prescribed conduct. It can occur as negative conditionality (deprivation of benefits in case of non-fulfilment), positive conditionality (provision of additional benefits in case of fulfilment), or a connection of the two ("carrot-and-stick conditionality").[142]

Hence, for enhanced cooperation 'conditions', the classification depends on the nature of the condition and of the enhanced cooperation. If the enhanced cooperation project is designed in a way that is particularly beneficial for the (or some of the) participating Member States and the condition goes beyond what is indispensable for its functioning and pursues (at least *also* pursues) an additional distinct policy objective, it might qualify and be used as a positive conditionality.

3.3.3.2 Legal Framework of 'Conditions'[143]

The Treaties (Art. 328 (1) TFEU) give little guidance about the nature of 'conditions':

> *When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision.*

According to the wording "any conditions", it could follow that there is no limitation as to what enhanced cooperation parties can ask of interested Member States. However, such an interpretation would be incompatible with the importance of the principle of openness in the enhanced cooperation mechanism. Moreover, the provision must be read in the broader Treaty context, and particularly in the context of the other provisions on enhanced cooperation. Therefore, the conditions must respect rights and obligations of non-participating Member States (Art. 327 TFEU), cannot undermine internal market or cohesion in the EU, or establish trade barriers and discriminations.

Some more clarity can be drawn from the Treaty negotiations: According to the European Conventions'[144] explanatory documents, delegations were in agreement that Art. 328 TFEU

[142] Viorica Viţă, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, p. 122. *Viţă* focuses particularly on spending conditionality.
[143] By 'conditions', I mean conditions in a broad sense, including normal conditions and conditionalities.
[144] Art. 328 TFEU was drafted in the process of drafting the European Constitutional Treaty but transferred to the Lisbon Treaty without changes.

referred to *objective* conditions.[145] According to the Convention, the conditions were introduced so that enhanced cooperation would "no longer be designed basically as a substitute for unanimity". Instead, "[t]he enhanced cooperation mechanism could also be based on objective differences, or even reflect objective criteria for participation by particular Member States, as with the adoption of the Euro, participation in the Schengen system, or indeed some aspects of defence".[146] Hence, it becomes clear that the Treaty drafters envisaged conditions that, in addition to being objective, are strongly *linked* to the content of enhanced cooperation. They intend requirements that an enhanced cooperation is "based on", i.e. fundamental for its functioning, or at least so beneficial for it that states can require their fulfilment as "criteria for participation". Arbitrary criteria, which basically aim to establish a core group of Member States within the EU but are disconnected from the content of the enhanced cooperation (say, requiring Euro membership for an enhanced cooperation in defence policy), would not fit this description and would therefore not be admissible under the principle of openness.

A detail that follows from the necessity of conditions to be "objective" is that they must be as clear and unambiguous as possible. In fact, for Member States which do not fulfil an enhanced cooperation criterion, the prerequisite leads to *involuntary* differentiation. To justify a limitation on the principle of openness in this politically highly sensitive context, the question whether conditions are fulfilled should, to the maximum extent possible, be easy to clearly answer as either yes or no. Conditions that can be reached gradually are hardly workable and would guarantee opposition.

In the European Conventions' explanatory documents, it is notable that the given examples include conditions that might be able to permanently exclude certain Member States. An enhanced cooperation limited to Member States which are members of the Euro and Schengen excludes countries that opted out of these measures (one could also mention the voluntary but permanent non-fulfilment of the Euro convergence criteria by states like Sweden). Moreover, the Convention must have been aware that enhanced cooperations in the area of defence could have the possibility to permanently exclude certain Member States because of

[145] CONV 723/03, p. 22.
[146] CONV 723/03, p. 22.

national constitutional restraints (i.e. neutral Member States like Sweden, Finland, Austria, or states with strict constitutional requirements for deployment of military, like Germany).

It follows from this that the conditions referred to in Art. 328 (1) TFEU must be linked to and necessary for the purpose of the enhanced cooperation; they can, however, limit the openness of the cooperation to an extent that single Member States may even permanently be excluded by them.

It is important to note that the conditions do not only apply to states interested in joining an enhanced cooperation, but also to the initial Member States.[147] This is crucial because it prevents the initial states from applying conditions that they themselves could not fulfil, effectively building a wall around a core of states via an enhanced cooperation. It follows from this that the Treaties prevent the Council – even if it has the support of the Commission - from retrospectively changing the authorisation decision to add such conditions. An exception to this could only be made if all participating Member States would have fulfilled them at the time of the authorisation.

The authorisation decision potentially containing participation conditions is drafted by the Commission and can only be amended by the Council with an unlikely unanimous decision (Art. 293 (1) TFEU) or by the Commission itself. Hence, it is the Commission that is in charge of including conditions in the draft decision. However, given that the Council has an exclusive right of initiative, the Commission must to a certain degree be bound by the requests of the Member States since otherwise it could propose a substantially different enhanced cooperation and undermine the Council's initiative. This gives Member States a substantive possibility to influence the Commission when deciding whether or not to include conditions in the proposal.[148]

Despite the fact that the Treaties only mention conditions in the authorisation decision, the practise shows that the Commission, when evaluating the participation request of an interested Member State, also investigated conditions in the implementing legal acts in three out

[147] CONV 723/03, p. 22.
[148] Ulrich Becker, *Art. 20 EUV, Art. 326-334 AEUV*, Art. 328 AEUV para. 3 f., Art. 329 AEUV para. 8 f.

of four cases.[149] Hence, it can be assumed that the Commission, as responsible legal actor, would regard a condition in the implementing legal act as binding like one in the authorisation decision.

In summary, conditions for the participation in an enhanced cooperation must be fulfilled by all participating Member States from the beginning and must be objective, which includes that they must be unambiguous (possible to be answered with yes or no beyond reasonable doubt). Moreover, they must be linked to the nature or the functioning of the measure introduced through enhanced cooperation. While they could be proposed by the Commission, it is likely that the Member States will take the initiative in case of future uses.

This is true for both mere conditions and conditionalities. However, especially the criterion of a significant link between a criterion and the functioning of the enhanced cooperation can be problematic for a conditionality, which by definition has a purpose that goes beyond the primary purpose – here the functioning of the enhanced cooperation. It follows from this that for an enhanced cooperation condition to work as a conditionality, it must be closely linked to the functioning of the enhanced cooperation, while at the same time furthering a policy objective that goes beyond its scope.

3.3.3.3 Potential Conditions, Conditionalities and their Implications

As stated above, the possibility to introduce conditions (and therefore also conditionalities) to enhanced cooperation has not been used to this day. It is, however, a political tool that could be used in future, in particular in response to the many political crises of our time.

In the absence of real life examples, I will introduce hypothetical examples of possible future enhanced cooperations to show how conditions and conditionalities would work in practice and to further illustrate the differences between the two. In doing so, I will apply the legal criteria established above to test their legal feasibility. Moreover, I will try to show which kind

[149] Commission Decision 2014/39/EU para 5; Commission Decision (EU) 2016/1366 para 6; Commission Decision (EU) 2015/1753 para 5; the standard phrasing is "The Commission notes that neither [AUTHORISATION DECISION] nor [IMPLEMENTING LEGAL ACT] prescribe any particular conditions of participation in enhanced cooperation in the area of […].

of political leverage could be gained by using enhanced cooperation conditionalities. To stay as close as possible to the real problems the EU is facing at the moment, I will use the two main fields in which conditionality has been discussed recently as examples: the EMU governance and the rule of law crisis.

3.3.3.3.1 Eurozone/EMU Governance

Any EU action regarding the Eurozone differentiates per definition. Therefore, legal action that does not include all Member States is the norm, and the Member States never had to resort to enhanced cooperation. To this end, Art. 136 ff. TFEU in connection with Art. 121 and 126 TFEU give the Eurozone Member States the possibility to legislate in a certain limited number of fields in an enhanced cooperation-*esque* way, with only the Eurozone Member States being able to vote. Beyond the scope of these provisions, if they want to legislate on questions regarding the single currency, the acts must be passed by the EU as a whole, while their scope of application is limited to the Member States whose currency is the Euro.[150]

The fact that such action often requires unanimity makes it apparent that sometimes this path is not viable.[151] In such situations, enhanced cooperation may provide a possible way forward.[152] To limit such a hypothetical enhanced cooperation to the Eurozone Member States, it would be an obvious choice to make participation dependent on having the Euro as a currency. While this would permanently exclude some Member States to whom the enhanced cooperation would not be *open*, the Treaty drafters explicitly foresaw this case, and the legality of this procedure could hardly be denied per se.[153] Having the Euro as a currency is an objective, unambiguous factor and therefore suitable to be an enhanced cooperation condition. Nevertheless, it must be stressed that not any legal measure could be passed and limited to the Eurozone this way. As set out above, the condition must have a close link with the content of the enhanced cooperation, i.e. with having the Euro as a currency.

[150] See e.g. the proposal COM(2017) 824 final, Art. 1 (2) and 4.
[151] An example for this is the UK's veto against the Fiscal Compact, https://www.theguardian.com/world/2011/dec/09/david-cameron-blocks-eu-treaty (accessed 25.06.2018).
[152] Michele Messina, *Strengthening economic governance of the European Union through enhanced cooperation: a still possible, but already missed, opportunity*; Michael Schwarz, *A Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation*; Johannes Graf von Luckner, *How to Bring It Home – The EU's Options for Incorporating the Fiscal Compact into EU Law*.
[153] CONV 723/03, p. 22.

In recent times, a frequently occurring policy proposal is that of a Eurozone budget.[154] There is wide agreement that the economic side of EMU governance needs to be strengthened.[155] Therefore, if such a budget was introduced using the enhanced cooperation mechanism,[156] it would not be hard to establish a link between a Eurozone budget and the condition of having the Euro as a currency to participate – Member States with their own currency are affected significantly less by the lack of economic governance in the EMU. When it comes to the proposal to establish a new tax to finance this budget,[157] the link is considerably less clear and can be challenged: The link to limiting the measure to Eurozone states would, again, be made through the necessity to strengthen the economic side of EMU. However, it would only be indirect since the measure to strengthen the EMU would not be the tax, but the Eurozone budget ("We need a new tax which must exclude all but Eurozone Member States because we need to strengthen the economic side of EMU"). Whether this link is still close enough is a question that would, in such a scenario, likely have to be decided by the Court of Justice eventually.[158]

In any case, the purpose for introducing Eurozone membership as a condition would in all likelihood not aim to incentivise further Member States to join the Eurozone. Therefore, it would be a mere condition and not a conditionality.

Another viable and conceivable condition could be a link to the intergovernmental aspects of the EMU which not all Member States participate in, like the Fiscal Compact or the ESM treaty.[159] EU action in this field could be passed as enhanced cooperation and limited to the Members who are party to one or all of these international law measures. If the reason for linking new, differentiating legal acts to the older intergovernmental measures is limited to necessities, such as the new measures making active use of the older ones, the link would be

[154] https://www.euractiv.com/section/economy-jobs/news/macron-wins-merkels-backing-on-budget-for-eurozone/ (accessed 25.05.2018).
[155] Alicia Hinarejos, *An Asymmetric EMU*, p. 4 ff.
[156] Art. 332 TFEU could, in addition, be a particularly easy way to establish its funding separate from the EU budget.
[157] https://www.euractiv.com/section/economy-jobs/news/macron-wins-merkels-backing-on-budget-for-eurozone/ (accessed 25.05.2018).
[158] It is indeed likely that such a project would end up at the Court as the proceedings against the Financial Transaction Tax even before the adoption of law implementing it shows; see ECJ C-209/13 (*United Kingdom v Council*), ECLI:EU:C:2014:283.
[159] Alicia Hinarejos, *Institutional Responses to the Crisis*.

easy to show, and the measure would qualify as a condition rather than a conditionality. However, if the aim of the linking were *also* to make a higher number of Member States participate in the older framework, and the new enhanced cooperation project would bring certain benefits, it could also qualify as a conditionality. As long as there is nevertheless a sufficiently strong link to the measure (e.g. the need for guaranteed financial stability to participate in the hypothetical new measure), limiting enhanced cooperation to participating Member States of said intergovernmental instruments would still be legally feasible.

Finally, it could be debatable whether to use a consistent fulfilment of budgetary rules as a condition for an enhanced cooperation in the EMU governance. What is complicated about this approach is that depending on the enhanced cooperation project, the policy goal pursued by a hypothetical enhanced cooperation and by the conditionality could both be EMU stability. Nevertheless, if the budgetary compliance is sufficiently relevant for the enhanced cooperation, this approach would not be excluded.

In conclusion, while many legal acts concerning the governance of the EMU can be passed on the basis of Art. 136 TFEU and thus be limited to the Eurozone Member States from the outset, in situations in which Art. 136 TFEU is not applicable, enhanced cooperation could be used while the measures could still be limited to certain groups of states. Beyond that, even where Art. 136 TFEU *is* applicable, Member States could choose to go for enhanced cooperation and use its conditionality clause to incentivise Member States to pursue certain conducts.

3.3.3.3.2 Rule of Law Conditionality

Another field in which conditionality is considered particularly often is the rule of law.[160] Internal practices in some Member States are increasingly seen as threats to the rule of law, and the procedure foreseen for such scenarios, Art. 7 TEU, is proving ineffective because of the unanimity requirement in paragraph 2 thereof. In this situation, Member States are looking for ways to protect the rule of law without a unanimous vote. One proposal which is currently

[160] See e.g. Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final; Gábor Halmai, *The Possibility and Desirability of Rule of Law Conditionality*; Armin von Bogdandy and Michael Ioannidis, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*; Laurent Pech, *The EU as a global rule of law promoter: the consistency and effectiveness challenges*.

being discussed and investigated is to apply negative spending conditionality to EU funds.[161] It can be argued that another, albeit somewhat unexpected, mode to motivate Member States to apply higher rule of law standards could be positive conditionality introduced through enhanced cooperation. In the following, I will examine the feasibility of such action.

To create such a positive conditionality incentive, Member States would first need to come up with an enhanced cooperation that would be beneficial for the Member States with rule of law-conflicts. Such action is not proposed at this time. Hence, the following scenario, which can illustrate how conditionality could be used as a political tool, is again hypothetical.

If one assumes that Member States will not succeed in including spending conditionality in the existing EU funds regime, it is conceivable that such funds could be limited to the extent admissible under Art. 174 ff. TFEU. In order not to penalize fund-receiving Member States without rule of law problems, similar programmes based on a common understanding of the rule of law could be set up instead. Such support programmes could be linked with rule of law criteria by design, making it likely for them to fail in the Council. This could pave the way for enhanced cooperation,[162] and the criteria could then reappear as 'conditions' in the sense of Art. 328 (1) TFEU. Since the implementing law is only passed at a later stage, the final design could be such that it would be interesting for initially opposed Member States to join after all. Since the overall aim in doing all this would be to sustain the rule of law in the Member States in a broad sense, and not only when it comes to the specific programme, the measure would qualify as a conditionality.

In such a context – and again, this is only a hypothetical scenario that can be replaced by others – it would be crucial to understand what types of conditionalities are legally feasible.

The first problem in this context is the notion 'rule of law' itself. The term is difficult to grasp; its precise content is contested. Nonetheless, there are a notable number of previous experiences with rule of law conditionality. Usually, this tool is applied in the EU's foreign action, for example, in EU accession procedures or trade agreements (see Art. 21 TEU). In these cases of application, the EU never managed to do so with an agreed definition or one cohesive framework describing its content. To give an example, in the accession procedures for countries

[161] COM (2018) 324 final.
[162] As required by Art. 20 (1) TEU, cohesion policy is a shared competence according to Art. 4 (2)(c) TEU.

aspiring to become Member States, the EU either refers to the notion of rule of law as such, without further defining it, as in Art. 2, 49 TEU and the Copenhagen Criteria[163] or refers to single aspects of the rule of law in a somewhat "impressionistic manner",[164] different from case to case. This practise has not changed significantly in recent times: In the latest case of planned application, a proposal to apply negative spending conditionality to EU funds,[165] payments are connected to the absence of "a generalised deficiency as regards the rule of law in a Member State" (Art. 3). Although the proposal subsequently provides a list of factors that point towards such a generalized rule of law deficiency, the term is not defined here either. Hence, when applying rule of law conditionality, the EU regularly refers to the concept in general without providing a clear framework defining the inherently contested and unclear term.[166]

Regarding enhanced cooperation conditionalities, it must be borne in mind that, as set out above, conditions must be *objective, unambiguous*, and possess a *sufficiently close link* to the nature or functioning of the enhanced cooperation project. The breadth of terms such as "generalised deficiency as regards the rule of law" would make it difficult to determine when exactly this threshold would objectively be met. It would be even more difficult to imagine an enhanced cooperation subject that is sufficiently closely linked to this criterion in all its breadth to justify such a thorough interference with one of the founding principles of enhanced cooperation. Therefore, in the specific case of enhanced cooperation conditionality, the usage of the broad term 'rule of law' as a criterion would not be allowed by the Treaties.

However, in both accession conditionality measures and the proposed spending conditionality regulation, single notions that are part of the broad rule of law term are in addition pointed out in an exemplifying manner and could possibly be used instead. Some of these refer to notions such as the proper functioning of budgetary authorities (Art. 3 (1)(a) Spending Conditionality Proposal), proper functioning of public prosecution services (Art. 3 (1)(b)), or effective judicial review (Art. 3 (1)(c)). While of course being very important to the rule of law, these

[163] http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en (accessed 27.07.2018), see also https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en (accessed 27.07.2018), chapters 23 and 24.
[164] Laurent Pech, *The EU as a global rule of law promoter: the consistency and effectiveness challenges*, p. 10; for examples, see COM (2014) 700 final on the enlargement strategy regarding the countries of the Western Balkans and Turkey.
[165] COM (2018) 324 final.
[166] Laurent Pech, *The EU as a global rule of law promoter: the consistency and effectiveness challenges*, p. 8 f.

notions are similarly wide and vague, and would result in the same problems as described before. Others, however, address specific aspects like a functioning recovery of funds unduly paid (Art. 3 (1)(e)). At least to the extent that it is established on a European level that funds were paid unduly, the question whether or not they were recovered in a specific period can objectively be answered with a yes or no. It can be argued that for the allocation of funds, it is crucial that they are recovered in the case of undue payment, providing for a close link to the nature of such a hypothetical enhanced cooperation. Nevertheless, the policy objective of demanding the recovery of unduly paid funds goes beyond the primary purpose of ensuring the recovery of funds in this specific tool, namely a functioning recovery of unduly paid funds in general, making this hypothetical condition a true conditionality. Hence, while it would be a very narrow precondition, factors like this could be used as conditionalities under Art. 328 (1) TFEU.

Finally, Art. 3 (1)(f) mentions effective and timely cooperation with the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) as criteria. While the clarity of these terms, effectiveness and timeliness, again pose difficulties, there is an interesting aspect to the EPPO in this context. The EPPO was itself established through an enhanced co-operation.[167] Non-participating Member States include Hungary and Poland, which are at the centre of the EU's ongoing rule of law-dispute[168] - from the point of view of most of the EU Member States and Institutions, it would surely be desirable for them to participate in the project, [169] a policy objective that would go beyond the necessities of the hypothetical enhanced cooperation. At the same time, since the purpose of the EPPO is to more effectively prosecute crimes against the EU budget, there is a close link to EU action with the involvement of funds, and it can be argued that the existence and jurisdiction of the EPPO will be beneficial to the functioning of such action. Moreover, participation or non-participation is an objective factor. What must be kept in mind, though, is that at least according to the Treaty drafters, the principle of openness does not only cover the right to join an enhanced cooperation but also the right to refrain from doing so.[170] Therefore, when making the participation in one

[167] Though based on the specific legal base in Art. 86 TFEU; see Council Regulation (EU) 2017/1939.
[168] http://www.consilium.europa.eu/en/press/press-releases/2017/10/12/eppo-20-ms-confirms/ (accessed 12.7.2018).
[169] See also proposals of EU Commissioner Jourová, https://www.politico.eu/article/eus-jourova-wants-funds-linked-to-new-prosecutors-office/ (accessed 11.09.2018).
[170] CONV 723/03, p. 21.

enhanced cooperation a condition for participating in another one, it is crucial not to give the impression of not actually giving the non-participants a choice by attaching a too significant incentive to it. Another issue in this context would be the question of how to treat the Member States with an AFSJ opt-out, which do not participate in EPPO.

However, if these issues were taken into account, the requirement to be part of EPPO could legally be established as a 'condition' under Art. 328 (1) TFEU and constitute a type of positive rule of law-conditionality under enhanced cooperation.[171]

3.3.3.4 Conclusions on Conditions and Conditionality

In conclusion, the possibility to include conditions in enhanced cooperation projects (Art. 328 (1) TFEU) enables enhanced cooperation Member States to try and incentivise other Member States to follow a certain conduct. Since the conditions can be driven by policy objectives that go beyond the mere functioning of the enhanced cooperation, these can constitute true (positive) conditionalities where participation is beneficial for Member States. However, the nature of enhanced cooperation and the principle of openness largely limit Member States in introducing such conditionalities: The "conditions" must be limited to preconditions that have a sufficiently close link to the nature or the functioning of the enhanced cooperation. Moreover, it must be possible to clearly answer whether or not such a precondition is fulfilled, without major involvement (and especially discretion) of any institution. Finally, it must be stressed that the conditions and conditionalities must follow the general rules of the enhanced cooperation mechanism (respect of rights and obligations of non-participating Member States, obligation to promote participation), as well as the general principles of European law such as sincere cooperation, proportionality, and the fundamental rights of individuals as laid down in general principles and the Charter.[172] These are factors that need to be taken extremely seriously when trying to introduce enhanced cooperation conditionality.

[171] On problems arising when a proposal for an EU legal act refers to an enhanced cooperation: Steve Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation*, p. 351 f.
[172] Viorica Viţă, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality* , p. 138.

3.4 Conclusions on the Principle of Openness

In conclusion, the analysis of the principle of openness revealed that there is more to it than a changed Commission proposal before, and a Commission decision confirming participation after, the enhanced cooperation is "in progress". With the Requesting Phase, the Preparation Phase, the Authorisation Phase, the Implementation Phase, and the Enactment Phase, there are five distinct phases which have different political implications when states are interested in joining an enhanced cooperation.

Moreover, a valid argument can be made together with many commentators that enhanced cooperation is limited by the existence of an unwritten requirement of being sincerely willing to cooperate. Looking at the enhanced cooperation practise, it seems like the Commission is in agreement with this finding and conducts a benefit assessment before confirming the participation of interested Member States in an enhanced cooperation. The Commission could use the sincere willingness requirement to refrain from confirming the participation of a Member State or even declare the participation of a Member invalid *ex ante* (depending on the phase in which the Member State in question joined, this task might also be up to the Council).

And finally, the possibility to bind participation in an enhanced cooperation to the fulfilment of certain conditions according to Art. 328 (1) TFEU could, in light of the challenges the EU is facing, be wakened from the deep sleep it has been in since the introduction of this possibility in 2007. If so, the conditions could not only be limited to mere criteria but could, under some circumstances, amount to conditionalities. This would largely influence the nature of future enhanced cooperations and their usage. Yet it would not generally be excluded by the Treaties.

Despite these possibilities, the principle of openness stays above all a guarantor of the enhanced cooperation's nature as a tool for multi-speed integration, allowing for all Member States to join if interested. This can also be derived from the numbers presented above (Table 1): Member States joined ongoing enhanced cooperation projects on a total of 36 occasions, 15 of which happened significantly (>6 months) after the initiation of the procedure.

Hence, it can be said the principle of openness is successfully fulfilling its task.

4 CONCLUSIONS

From the beginning, the idea of differentiated integration was partly interpreted as a concept allowing an exclusive core of Member States to be established and jointly reach a deeper level of integration.[173] Precisely because of its exclusiveness and lacking equality of Member States, the "core Europe" is being criticised heavily to this day.[174] The principles of last resort and openness are the antagonists of such exclusive cores within the European Union. Enhanced cooperation enables groups of Member States to integrate further before all Member States are ready to take such steps. In this process, the principles of last resort and openness ensure that nevertheless the cohesiveness of the European integration is safeguarded, and the enhanced cooperation groups cannot detach themselves from the non-participating EU-members. To ensure this, the two principles intertwine in the procedure: The last resort principle prevents Member States from using the enhanced cooperation mechanism too easily and quickly. In doing so, it guarantees that enhanced cooperation stays the exception to the rule of uniform EU legislation. The principle of openness, on the other hand, intervenes once the Member States opted for an enhanced cooperation and ensures that all other members can join the enhanced cooperation-Member States whenever they are willing. Thus, it keeps the boundaries between "Ins" and "Outs" fluent and, like a one-way valve between the two, prevents the states in the enhanced cooperation from staying among themselves and excluding other Member States. Together, the two principles prove that despite the possibility of differentiation, the default scenario in the European Union is unity and, hence, uniform legislation.

The numbers from the practical application of enhanced cooperation demonstrate that the two principles fulfil their joint mission successfully: All Member States by now participate in at least one enhanced cooperation. Since the start of the EPPO project, only four Member States (UK, Ireland, Denmark, and Poland) participate in only one of them, with the first three being special cases because of their different opt-outs, which affect three out of five enhanced cooperations. Finally, eight Member States (Austria, Belgium, France, Greece, Italy, Portugal,

[173] Wolfgang Schäuble and Karl Lamers, *Überlegungen zur europäischen Politik*; For details on the concept, see Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 32 ff.

[174] Stephen Weatherill, *On the Depth and Breadth of European Integration*; Bohuslav Sobotka, "Two-speed Europe is a mistake," *Politico*, 12.06.17; James Krynica and Jim Brunsden, "Polish president warns 'multi-speed' EU will collapse," *Financial Times*, 05.09.17, citing Polish President Andrzej Duda.

and Slovenia) participate in all projects.[175] This is a relatively large, but very heterogeneous group, which surely no one had in mind when imagining that enhanced cooperation would lead to a "core Europe".

By providing a possibility for Member States to overcome differences while still keeping them in a common structure with common rules and a single institutional framework, the principles of openness and last resort ensure that enhanced cooperation does not undermine but strengthens the idea that the EU is founded as a Union of equal Members with similar interests and aims. Not least, last resort and openness demonstrates that differentiation does not have to lead to fragmentation.

[175] See Table 1 as well as Sebastian Zeitzmann, *A Rather Strange Animal, this "Enhanced Cooperation"*, p. 102 and Robert Böttner, *Eine Idee lernt laufen – zur Praxis der Verstärkten Zusammenarbeit nach Lissabon*, p. 548.

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